

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA, Civil Action
No. 21-02886
Plaintiff(s),
vs.

BERTELSMANN SE & CO. KGAA, Washington, D.C.
et al, August 17, 2022
9:30 a.m.
Defendant(s). **Morning Session**

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE FLORENCE Y. PAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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EDWARD A. SNYDER, PH.D.

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1 The following proceedings began at 9:30 a.m.:

2 THE COURT: Good morning.

3 THE COURTROOM DEPUTY: Good morning, Your Honor. This
4 is civil case No. 21-2886, United States of America versus
5 Bertelsmann SE & Co. KGaA.

6 Would counsel please approach the podium and state
7 their appearances for the record.

8 MR. READ: Yes. We may not be doing this ritual for
9 many more days, Your Honor. We are nearing the end.

10 John Read for the United States. With me at counsel
11 table are Melvin Schwarz, Ethan Stevenson, and Ihan Kim.

12 THE COURT: Good morning.

13 MR. PETROCELLI: Good morning, Your Honor. Daniel
14 Petrocelli for Bertelsmann and Penguin Random House together
15 with a number of my colleagues too numerous to name.

16 THE COURT: Good morning.

17 MR. FISHBEIN: Good morning, Your Honor. Stephen
18 Fishbein for ViacomCBS and Simon & Schuster.

19 THE COURT: Good morning, Mr. Fishbein.

20 We had agreed yesterday that we would begin today by
21 addressing the matter of the government's motion to exclude the
22 defendants' efficiencies. So I am prepared to hear oral
23 argument on that issue and to issue a ruling at this time.

24 MR. SCHWARZ: Good morning. Mel Schwarz for the
25 United States. May it please the Court.

1 I don't want to belabor this issue too much with a lot
2 of case discussion, but I am prepared to go into as much detail
3 as you like with respect to the cases.

4 I think there are two essential reasons why the
5 efficiencies claims, and I will call them that because the law
6 is a little unclear about whether it's an actual affirmative
7 defense or burdens of proof, but we will just call them claims,
8 the two reasons why it fails.

9 First of all, putting aside the independent expert, if
10 we just went on what we have heard, it fails. It's neither
11 verified nor verifiable. We are looking at a financial model
12 prepared, as Your Honor heard, for the purposes of purchasing
13 Simon & Schuster. It was prepared by someone who doesn't know
14 anything about the horizontal guidelines. That's no fault of
15 his, but that's the truth of the matter, and it is based on
16 November 2020 data.

17 Even though it was updated innumerable times, I don't
18 even think Mr. Sansigre knows how many times, for some reason
19 which I can't explain, perhaps Mr. Frackman can, the November 9
20 model becomes the holy grail for them. I don't understand it.

21 So we don't have any updates of actual data which
22 obviously would be relevant to many things because, as Your
23 Honor heard, the 12.3 percent on operating expenses is hard
24 coded, hard wired. Whatever term you want to use, you get the
25 point.

1 So beyond that, he uses hard coding from a
2 seven-year-old, seven years old in 2020, merger of Penguin and
3 Random House in which -- and Your Honor hasn't heard. There's
4 a lot more evidence about dis-synergies in terms of revenue.
5 We haven't heard that evidence.

6 In any event, even if we looked at that, the world has
7 changed dramatically since 2013. We had the rise of ebooks and
8 audio books, and we have 26, I think the witness said, mergers
9 in the meantime, including major independents like Workman and
10 HMH.

11 So those numbers are simply not sufficient. And the
12 coup de grace on all this is that Mr. Sansigre testified in his
13 deposition that you don't know the exact numbers until you do
14 an integration plan, which is perfectly logical, because he did
15 not and could not go through one by one and say we want to keep
16 this employee, we want to get rid of this employee, this person
17 stays, this one goes and, of course, their salaries are
18 different. So you can't make these judgments until afterwards.

19 Why they didn't hire an independent expert, which is
20 point two, again, I can't speak to that. But the law has been
21 clear since the 2010 guidelines that you need to have
22 independent verification. Judge Howell said that shortly after
23 this.

24 There are three other cases that I can cite for Your
25 Honor which say that point blank. The D.C. Circuit in the

1 Anthem case is extremely skeptical of all these things, which
2 is another issue. If we had to, Your Honor, at the end of this
3 trial, we will tell Your Honor there is no efficiencies defense
4 in this circumstance where you have the number one company
5 trying to buy the number three. They don't need efficiencies.

6 Frankly, if~anything, the evidence would be, if we
7 keep going, that S&S is leaner than PRH, but that's another
8 story.

9 THE COURT: Can I ask with you, Mr. Schwarz, based on
10 your argument, we could never have efficiencies evidence in a
11 merger trial because you are saying we would never know until
12 after the merger is complete. We would never have good enough
13 data for you until that point. There must be something short
14 of that. The degree of precision you are demanding can't be
15 required.

16 MR. SCHWARZ: That is not the case, Your Honor. It
17 would have been very easy for them to hire McKinsey.
18 Dr. Israel is the name of an expert who comes up frequently on
19 the defense side of many of these cases. It would have -- I'm
20 sure, particularly after the contract was signed, they could
21 have sent them in, as they did by the way in the Anthem case,
22 and go through and come up with things that could well be
23 cognizable efficiencies.

24 There's also lots of cognizable efficiencies that one
25 could imagine that are fairly clear. If you have, you know,

1 somebody who doesn't have a factory that is state of the art
2 and can move there, you could envision something that is fairly
3 clear. But you would still need -- and I couldn't imagine, you
4 know, if I were sitting up there, Your Honor, which I never
5 will be, but --

6 THE COURT: You never know, Mr. Schwarz.

7 MR. SCHWARZ: -- how I would figure out without the
8 aid of experts on both sides poking holes in this to figure
9 this out. We need to have an expert. It is perfectly possible
10 to do this after the contract is signed. The reason
11 Mr. Sansigre can't do it is because if the deal falls apart,
12 they are competitors and he can't see all this confidential
13 data. He can't see the employees' salaries because there would
14 be poaching going on.

15 If Dr. Israel or McKinsey came in, it would be
16 perfectly plausible for them to do that. And that's what
17 happens in cases where these merger efficiencies are
18 considered.

19 I would be the first to admit that it's extremely rare
20 for efficiencies defenses to carry the day even in the best of
21 circumstances, and you will hear a lot of argument about that
22 if we go further down this road.

23 But there is one and only one case -- I am going to
24 lay it straight out for Your Honor. There's one case that they
25 cite in which -- and this is Judge Hogan and before the merger

1 guidelines, 25 years ago in the first Staples case where he
2 heard -- he heard evidence from a management witness, and then
3 he proceeded to listen to the defense witness and completely
4 discredit the management expert and found, and I'm quoting,
5 defendant failed to produce the necessary documentation for
6 verification. And that was at 970 F.Supp 1058 at page 1089.
7 That is it. That is the one case where this evidence went to a
8 consideration by the judge.

9 THE COURT: Okay.

10 MR. SCHWARZ: And two holdings, Judge Howell's case
11 and Judge Chutkan case, the Wilhelmsen case, are holdings in
12 which they said, because there's no independent expert, we will
13 not credit, even though there was an effort to present that
14 evidence.

15 Unless Your Honor has questions, that's all I have to
16 say.

17 THE COURT: Thank you, Mr. Schwarz.

18 MR. SCHWARZ: Thank you.

19 THE COURT: Mr. Frackman.

20 MR. FRACKMAN: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. FRACKMAN: I have some slides that I might use,
23 but let me start by addressing a few questions.

24 Every witness that the Court has heard discussing this
25 transaction, I am not just talking about the Penguin Random

1 House witnesses, the Simon & Schuster witness, the
2 HarperCollins witness, the Hachette witness, they have all
3 testified that there are likely tens of millions of dollars of
4 synergies flowing from an acquisition of Simon & Schuster by
5 another publishing house, not a few million, tens of millions.
6 I won't say on the record. The Court has heard that testimony.

7 The Penguin Random House estimate, although different
8 in some respects, is not out of line with the estimates of
9 these other potential acquirers and of Simon & Schuster itself,
10 point one.

11 Point two, the test is not mathematical precision. We
12 are predicting the future. Even the best models have a
13 component of uncertainty to them. There is no case that says
14 you have to have mathematical precision with respect to any
15 forward-looking projection including efficiencies.

16 Third, there is no case that mandates an expert to
17 prove efficiencies. They are used sometimes. They weren't
18 used in Staples. They weren't used in Peabody, the recent 2020
19 case from the Eastern District of Missouri.

20 And we all know that as good as experts are in certain
21 respects, paid experts, experts are experts. They are not
22 independent, court-appointed neutrals. To suggest that an
23 expert is more reliable than a fact witness when it comes to
24 estimating efficiencies of this type is, I think, highly
25 speculative.

1 THE COURT: What did you mean by court-appointed
2 neutrals?

3 MR. FRACKMAN: Well, I mean, there are cases where the
4 court appoints its own expert to assist the court in making
5 findings. Judge Kaplan did that a few years ago in the
6 Southern District of New York to assist on economic matters in
7 an antitrust case.

8 But as independent as experts are, I think it is
9 illusory to think that they are required for this type of
10 proof. They may be helpful, but they are not the only way to
11 prove facts about efficiencies. No court has said they are.
12 No court has mandated them.

13 The test is that we have to prove that the projected
14 efficiencies are likely to be accomplished. That's a factual
15 matter. It requires findings by the Court. We can present
16 those facts in different ways as long as they are reliable.

17 Okay. So how does one predict the future when there
18 is some degree of uncertainty? And both the DOJ and the cases
19 have observed that the best place to ground those projections
20 are in reliable past experience. This is the district court in
21 FTC versus Peabody Energy.

22 Horizontal merger guideline section 10, by contrast,
23 efficiency claims substantiated by analogous past experience
24 are likely to be credited.

25 2006 commentary on the horizontal guidelines, the best

1 way to substantiate an efficiency claim is to demonstrate that
2 similar efficiencies were achieved in the recent past from
3 similar actions.

4 The reliance on Penguin Random House's history of
5 acquisitions, and in particular, the 2013 one, merger with
6 Penguin, is a very reliable basis. It is maybe the best basis
7 for predicting what will happen in the future.

8 THE COURT: Can I ask you about that, Mr. Frackman?

9 MR. FRACKMAN: Sure.

10 THE COURT: Then why did Mr. Sansigre project so many
11 revenue synergies when there were none in the 2013 merger?

12 MR. FRACKMAN: A fair question, Your Honor. The
13 evidence from the fact witnesses and Mr. Sansigre, but you also
14 heard it from Mr. Dohle, is that the revenue reductions that
15 Penguin Random House experienced actually starting in 2012 and
16 continuing in the years after the merger with Penguin Random
17 House -- with Penguin related to reductions in mass market
18 titles. It was an industry-wide change in response to, among
19 other things, ebooks.

20 THE COURT: Yes.

21 MR. FRACKMAN: And that's why, with respect to
22 projecting revenues going forward, that experience was not
23 reliable enough for Mr. Sansigre to base his projections on.

24 THE COURT: Yes, I heard that testimony, but I think
25 the revenue projections are ones that are not based on past

1 experience and are a good example of one that's just based on
2 management judgment which is not verifiable.

3 MR. FRACKMAN: I would say, Your Honor, that the
4 testimony was that it is based on past experience such as with
5 the other acquisitions, Little Tiger, such as with third party
6 distribution clients that come into the Penguin Random House
7 machine or a distribution system, and that, therefore, the very
8 small forward-looking projections on revenue growth that
9 Mr. Sansigre used in his model were based on past experience.

10 It is undoubtedly correct that when you are talking
11 about forward-looking revenue projections as opposed to cost
12 savings, there's an additional element of uncertainty. We
13 can't dispute that. That is just a fact. It's axiomatic with
14 respect to that type of projection. However --

15 THE COURT: Mr. Frackman, it seems to me that it is
16 possible to verify some of the work that Mr. Sansigre did. And
17 it was very detailed work. So an expert could or an
18 independent person trying to verify what he did could look at
19 all the inputs that he put into the spreadsheets, which were
20 very detailed, they could interview him and the other people he
21 talked about about what assumptions he made and determine if
22 those were reasonable assumptions. And I think much of the
23 work could be verified. I don't think that happened here, and
24 I am kind of wondering why.

25 But then there are some things that I don't think are

1 really verifiable, things like the revenue projections where
2 he's picking and choosing among the prior precedents. This is
3 not like the Penguin Random House merger, but it is like the
4 Tiger acquisition. He's exercising judgment that's not
5 verifiable. So what am I supposed to do with that?

6 MR. FRACKMAN: Well, the Court, of course, was
7 perceptive enough to notice that when we started with
8 Mr. Sansigre, we started with those that were easily verifiable
9 such as real estate savings.

10 THE COURT: Got it. Some of it can be but --

11 MR. FRACKMAN: Return rate differentials.

12 THE COURT: Got it.

13 MR. FRACKMAN: I think, Your Honor, this is why this
14 type of issue, I don't think there's any case where the court
15 has tried to grapple with it mid case because it does require a
16 fine tooth comb. We are going to have to look at the
17 individual categories. It is certainly possible that the Court
18 could conclude that some, if not the preponderance, of the
19 efficiencies we claim, real estate, IT, return rate
20 differentials, and other items, are verifiable and are
21 reliable, reasonably reliable, without having to find that with
22 respect to all of it.

23 THE COURT: I want to make sure I am understanding
24 you. Are you saying that I can pick and choose among these
25 efficiencies and credit some and not others?

1 MR. FRACKMAN: Absolutely.

2 THE COURT: But none of them are verified. How am I
3 supposed to do that?

4 For example, Mr. Sansigre said he, for the real
5 estate, he looked at leases and determined what the amounts
6 were, and then he looked at reports that said we can assume
7 50 percent savings because we can sublease. I am not looking
8 at the leases. I don't want to look at that. I don't want to
9 look at the report that told him 50 percent. I'm not in a
10 position to verify that Mr. Sansigre did what he said he did.
11 I don't see how a court can do the type of verification that's
12 necessary here because I don't think a court should just take a
13 merging party's word for it.

14 MR. FRACKMAN: This is why we provided, and it's
15 embedded in Mr. Sansigre's exhibits, the factual foundation to
16 substantiate those items. Real estate is a good example.

17 THE COURT: But you are expecting me to go into the
18 spreadsheets and look at those things and then look at the
19 leases and make sure he's correct?

20 MR. FRACKMAN: Well, it's one lease in particular.
21 The amount of the lease is set forth clearly in the papers.
22 The Court has our -- his testimony that points exactly where
23 the amount of the lease is, the expiration date, and the Court
24 has --

25 THE COURT: Why would you expect me to do that? Why

1 didn't you get an expert to do this for me? I don't see why
2 it's the Court's role to do this.

3 MR. FRACKMAN: Your Honor, that would be the
4 conclusion, that you must -- a party must have an expert in
5 order to prove efficiencies.

6 THE COURT: You don't have to but -- I don't think you
7 necessarily have to as a rule according to the horizontal
8 merger guidelines, but as a practical matter, it's your burden
9 and you can't expect a court to go through, as you said, with a
10 fine tooth comb what your clients have done. I don't
11 understand why you wouldn't get an expert to verify this
12 because otherwise you can't meet your burden.

13 MR. FRACKMAN: There's nothing more for an expert to,
14 quote, verify. The amount of the lease is set forth in the
15 documents. The termination date is set forth in the documents.
16 The support for the 50 percent re-leasing, re-letting
17 assumption is set forth in the documents.

18 THE COURT: Okay. Let's take a step back,
19 Mr. Frackman. I think the reason courts have wanted
20 verification and have been quite stringent in their
21 requirements is because merging parties have an incentive to be
22 optimistic about what the efficiencies are going to be. And a
23 lot of the paperwork and spreadsheets you are relying on were
24 prepared for different purposes, you know, to justify buying
25 the company. It wasn't for the purpose that we are now using

1 these spreadsheets for.

2 And given that -- and it's not to say that the parties
3 weren't acting in good faith, but of course they are optimistic
4 about what's going to happen. That's why they want to do this
5 deal. And the case law is clear that they could just project
6 fantastical efficiencies, as Judge Howell said. And if we are
7 going to look at efficiencies, we are going to be careful and
8 rigorous and make sure that they are independently verified,
9 verified by somebody, not the parties who have an incentive to
10 be very rosy in their expectations. Okay.

11 And on this record, there is no independent party that
12 has verified these efficiencies. And you are saying let's take
13 Mr. Sansigre's word for it. And I think Mr. Sansigre seemed
14 very competent and did a very careful job, but he can't verify
15 himself. And I don't think a court is in a position to do the
16 type of very careful, rigorous verification that is required to
17 rely on this evidence.

18 MR. FRACKMAN: Well, Your Honor, the test is
19 verifiable --

20 THE COURT: And verified. Cognizable efficiencies are
21 verified according to the horizontal merger guidelines.

22 MR. FRACKMAN: In every one of the cases that address
23 efficiencies, the Court has reviewed and made findings with
24 respect to the specific efficiencies. The Court always has to
25 make those findings, and that's why it's verifiable and whether

1 they are likely to be achieved.

2 With respect to real estate, it's a great one to start
3 with, what more could we do, Your Honor? We have --

4 THE COURT: You could have an independent expert look
5 at the leases and look at whatever JP Morgan study he was
6 relying on and verify that that was correct because I can't do
7 it.

8 MR. FRACKMAN: Look, Your Honor, it is totally
9 reasonable in my view, in our view, for the projection to be
10 based on the recommendation of JP Morgan.

11 THE COURT: I agree, but I don't know what that
12 recommendation was. I am not verifying and looking at what it
13 was.

14 MR. FRACKMAN: Well, it's in the record, Your Honor.
15 The actual document from JP Morgan that said greater than
16 50 percent is in the record. Mr. Sansigre took only
17 50 percent.

18 THE COURT: Okay. I think I understand your argument,
19 Mr. Frackman.

20 MR. FRACKMAN: IT is another example, Your Honor.

21 THE COURT: Okay.

22 MR. FRACKMAN: The amount assessed by Simon &
23 Schuster -- by Paramount to Simon & Schuster is stated in the
24 documentation in the model with the backup the actual line
25 items charged, assessed by the parent.

1 THE COURT: So I take it that this is just a strategic
2 choice that the defendants have made, that they decided not to
3 have an independent expert verify this because they chose to
4 ask the Court to go through all of the underlying documents to
5 verify the efficiencies of the November 2020 model. Is that
6 what you are saying?

7 MR. FRACKMAN: I don't think that's correct, Your
8 Honor, at all. Obviously it was a choice like all choices in a
9 case. We believe that Mr. Sansigre's analysis is detailed,
10 fact-based, reliable, more than sufficient for the Court to
11 find that they are likely or more likely to occur than not.
12 And, actually, I don't think an expert would relieve the Court
13 ultimately of having to make some decisions about that.

14 THE COURT: All right. Can you address the fact that
15 the model is not up to date, that it doesn't include the most
16 recent actual numbers?

17 MR. FRACKMAN: Yes. So, first of all, as Mr. Sansigre
18 testified yesterday, the difference between the November 2020
19 and January '22 amounts are minimal. I think he said
20 6 percent.

21 But more importantly, the core testimony here and the
22 rationale for using the November 2020 is that the last two
23 years have been so idiosyncratic because of the pandemic and
24 the impact in particular, well, on many businesses, but
25 particularly on the publishing industry, that it would be less

1 reliable to project going forward based on the last two years
2 than on the actual historical trends predating the pandemic.

3 THE COURT: How do we know that? How do we know that
4 that's a reasonable prediction, because none of us have a
5 crystal ball, and I think it's really not reasonable to assume
6 that the world is going to go back to pre-pandemic levels.

7 MR. FRACKMAN: Well, this, of course, would relate
8 primarily to the revenue enhancements. The cost savings are
9 the same and the --

10 THE COURT: The 2022 to the 2020 model, they are not
11 the same.

12 MR. FRACKMAN: Most of them are the same with the
13 exception of fulfillment.

14 THE COURT: No, I don't think so.

15 MR. FRACKMAN: They are very, very close, Your Honor.
16 Fulfillment is the one that changed. If the Court were to find
17 that, with respect to fulfillment, the more recent projection
18 is the more reliable, then the Court would use the more recent
19 projection.

20 THE COURT: Which are also not verified, but that's
21 another story.

22 [REDACTED]
23 [REDACTED]
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and art, but the additions from those lines don't account for that whole change.

These numbers are very different. And when you tell me that they are close, you are just saying the bottom line is close, but the actual line items are very different.

MR. FRACKMAN: Well, there are two things. One is the bottom line is close. Second of all, the --

THE COURT: I'm not sure why the bottom line being close is the operative factor because the merger guidelines say you have to justify each efficiency.

MR. FRACKMAN: Correct. This is why I said -- it is true that there are some small changes within the groups. Particularly I want to focus on the spending for a moment.

Yes, it is not a dollar-to-dollar correction if you move the op ex for editorial art and production into administration, but it's the large part of it. And one line item that has what I would call a significant change is fulfillment. And Mr. Sansigre testified as to why that number has changed.

Yes, if the Court were to find or conclude that it is more likely than not that we will not revert to pre-pandemic times and, therefore, the merged company is going to need the

1 warehouse space that is anticipated in January '22 as opposed
2 to crediting Mr. Sansigre's testimony that that is an outlier
3 because the historical experience with the warehouse needs are
4 more reliable, then we would use and the Court could use the
5 2022 fulfillment number.

6 THE COURT: Mr. Frackman, I just -- I'm just really at
7 a loss as to why I should be doing the work that you should
8 have gotten an expert to do. Like, why should I be doing that?

9 MR. FRACKMAN: That assumes that the test, Your Honor,
10 and the requirement is that we have an independent expert -- an
11 expert -- no expert is completely independent -- an expert.

12 THE COURT: I mean, you don't have to, but then you
13 are risking a judge telling you, I don't want to do the
14 verification for you.

15 MR. FRACKMAN: The Court is perfectly capable of
16 making findings on the reliability of financial numbers.
17 Courts do it all the time --

18 THE COURT: This is not a question of reliability.
19 It's a question of verifiability. So let me step back for a
20 moment.

21 I think we are in a different world in the merger area
22 versus regular Rule 702 where we talk about more general
23 reliability because we have the horizontal merger guidelines
24 and we have several cases that are persuasive in this actual
25 jurisdiction that talk about verifiable and verified

1 efficiencies.

2 Can you name a single precedent where a court has done
3 what you are asking me to do, that is, I should do the work of
4 verifying a very detailed November 2020 model with hundreds of
5 tabs to make sure that it's correct and reasonable? And is
6 that, in your view, a good use of the Court's time?

7 MR. FRACKMAN: Every court that has analyzed
8 efficiencies have looked at specific items and --

9 THE COURT: I am going to do that. I have listened to
10 the testimony. But I still can't satisfy myself that all of
11 this is verified. I have heard what Mr. Sansigre said he did,
12 but I am not in a position to verify it.

13 MR. FRACKMAN: Your Honor, if the holding of the Court
14 is that an expert is required as a matter of law, I can't argue
15 with that.

16 If the -- you know, but if the question is is the
17 factual support sufficient to establish that the efficiencies
18 are likely to occur or substantial amounts of the efficiencies
19 are likely to occur, then that finding can be made absent an
20 expert's gloss on it.

21 And, in fact, the horizontal merger guidelines
22 themselves say that efficiency claims substantiated by past
23 experience in the business, the actual business calculations,
24 are more reliable than when they are generated outside of the
25 usual business context.

1 THE COURT: I understand that. Thank you.

2 MR. FRACKMAN: Thank you.

3 THE COURT: Anything else from you, Mr. Schwarz?

4 MR. SCHWARZ: No, Your Honor. Just for the record I
5 would like to say that the Peabody Energy case, which he cited,
6 there was an expert in that case, and the court still rejected
7 most of the efficiencies in any event.

8 And I think the law is clear from the D.C. Circuit in
9 Anthem on the fact that these cannot be vague, speculative, or
10 otherwise cannot be verified by reasonable means. That's at
11 359. And I don't think this is reasonable at all.

12 THE COURT: Okay. Thank you.

13 The Court has heard the evidence on this issue and the
14 arguments of the parties and is prepared to rule.

15 Dr. Snyder is an expert witness for the defendants who
16 is offered to testify on merger-related efficiencies. His
17 expert opinion relies on a projection of synergies produced in
18 November of 2020 by Manuel Sansigre, a senior vice president at
19 Penguin Random House who's in charge of mergers and
20 acquisitions.

21 Mr. Sansigre produced his synergy projections to help
22 Random House evaluate whether it should acquire Simon &
23 Schuster.

24 Dr. Snyder's expert report offers three primary
25 conclusions about Mr. Sansigre's projections.

1 First, that the projected synergies are the type that
2 economists would recognize given the features of the publishing
3 industry.

4 Second, that the projected synergies are
5 merger-specific efficiencies.

6 Third, that the projected synergies would benefit
7 authors through higher income and consumers through greater
8 availability of books.

9 Significantly, however, Dr. Snyder concedes that he
10 did not, quote, independently verify specific dollar amounts,
11 unquote, and did not, quote, independently derive estimates,
12 unquote, of Mr. Sansigre's projected synergies. Thus, the
13 parties agree and stipulate that Dr. Snyder did not verify the
14 projections from the November 2020 model that form the basis of
15 his expert opinion on efficiencies.

16 The government filed a motion in limine to exclude
17 Dr. Snyder's testimony on efficiencies under Federal Rule of
18 Evidence 702. The government argued, among other things, that
19 Dr. Snyder's reliance on unverified projections rendered his
20 efficiencies testimony inadmissible under Rule 702, the
21 horizontal merger guidelines, and cases applying the horizontal
22 merger guidelines.

23 The Court essentially deferred ruling on the motion to
24 preclude the expert testimony on efficiencies determining that
25 it should hear the evidence about Mr. Sansigre's projections

1 before deciding whether the alleged efficiencies are verifiable
2 and verified as required by the horizontal merger guidelines
3 and persuasive case law.

4 The Court decided to hear the evidence during the
5 trial given that this is a bench trial but instructed the
6 parties to arrange the presentation of evidence so that the
7 verifiability of Mr. Sansigre's projected synergies could be
8 considered and argued and the Court could then rule on the
9 government's motion before hearing the totality of Dr. Snyder's
10 expert testimony on efficiencies.

11 The Court determined that it would be more efficient
12 to proceed in this fashion because if defendants were unable to
13 meet their burden to show that the efficiencies were
14 substantiated, verifiable, and verified under the horizontal
15 merger guidelines, then it would be unnecessary to consider any
16 of the other aspects of the efficiencies evidence.

17 The Court has now heard the evidence on the projected
18 efficiencies and arguments from the parties, and it will grant
19 the motion to preclude the efficiencies evidence because the
20 efficiencies projected by Penguin Random House are not
21 substantiated and verified.

22 Although many of the projections may be verifiable,
23 some are not verifiable. Moreover, the efficiencies have not,
24 in fact, been independently verified by anyone, and they,
25 therefore, are not cognizable under the horizontal merger

1 guidelines and are not reliable under Rule 702.

2 Finally, the Court concludes that the efficiencies
3 projections in the November 2020 model are unreliable because
4 they are out of date and include 2021 projections that have
5 been proved to be inaccurate.

6 The applicable legal standards are as follows:

7 Federal Rule of Evidence 702 concerning testimony by
8 expert witnesses provides, quote, a witness who is qualified as
9 an expert by knowledge, skill, experience, training, or
10 education may testify in the form of an opinion or otherwise
11 if, A, the expert's scientific, technical, or other specialized
12 knowledge will help the trier of fact to understand the
13 evidence or to determine a fact in issue; B, the testimony is
14 based on sufficient facts or data; C, the testimony is the
15 product of reliable principles and methods; and D, the expert
16 has reliably applied the principles and methods to the facts of
17 the case, unquote.

18 Rule 702 incorporates the Supreme Court's guidance in
19 Daubert versus Merrell Dow Pharmaceuticals, Inc. which called
20 upon trial judges to serve a gatekeeping role in ensuring that
21 an expert's testimony both rests on a reliable foundation and
22 is relevant to the task at hand.

23 Also in Kumho Tire Company, Limited versus Carmichael,
24 the Supreme Court clarified that the gatekeeper role extends to
25 all expert testimony.

1 And this is confirmed by Rule 702's advisory committee
2 note to the 2000 amendment.

3 The party seeking to introduce expert testimony must
4 demonstrate its admissibility by a preponderance of the
5 evidence. Courts take a flexible approach to deciding Rule 702
6 motions and have broad discretion in determining whether to
7 admit or exclude expert testimony.

8 Horizontal merger guideline section 10.

9 The horizontal merger guidelines outline the analysis
10 and enforcement practices of the Department of Justice and the
11 Federal Trade Commission with respect to horizontal mergers
12 under the federal antitrust laws including section 7 of the
13 Clayton Act. See horizontal merger guideline section 1.

14 Federal courts frequently use the guidelines to
15 develop legal standards in antitrust litigation. See, for
16 example, FTC versus H.J. Heinz Company, 246 F.3d 708. That's a
17 D.C. Circuit case from 2001.

18 Section 10 of the horizontal merger guidelines
19 discusses efficiencies. The guidelines observe that
20 efficiencies are difficult to verify and quantify in part
21 because much of the information relating to efficiencies is
22 uniquely in the possession of the merging firms. Moreover,
23 efficiencies projected reasonably and in good faith by the
24 merging firms may not be realized.

25 Therefore, the merger guidelines say, it is incumbent

1 upon the merging firms to substantiate efficiency claims so
2 that the agencies can verify by reasonable means the likelihood
3 and magnitude of each asserted efficiency.

4 Courts interpret this requirement of substantiation
5 and verification to encompass, quote, how and when each
6 efficiency would be achieved and any costs of doing so, how
7 each efficiency would enhance the merged firm's ability and
8 incentive to compete, and why each would be merger specific,
9 end quote. That's from United States versus H&R Block, 833
10 F.Supp.2d 36 at 89. That's a D.D.C. case from 2011, and it is
11 quoting the horizontal merger guidelines section 10.

12 Under the guidelines, projected efficiencies are
13 generally less credible when generated outside the usual
14 business planning process, and they are more credible when
15 substantiated by analogous past experience.

16 Ultimately, efficiencies must be cognizable to be
17 considered under the guidelines. Quote, cognizable
18 efficiencies are merger-specific efficiencies that have been
19 verified and do not arise from anticompetitive reductions in
20 output or service.

21 A cognizable efficiency claim must represent a type of
22 cost saving that could not be achieved without the merger, and
23 the estimate of the predicted saving must be reasonably
24 verifiable by an independent party. And that's quoting the
25 horizontal merger guidelines and also, I believe, H&R Block.

1 Case law provides that the Court must undertake a
2 rigorous analysis of the kinds of efficiencies being urged by
3 the parties in order to ensure that those efficiencies
4 represent more than mere speculation and promises about
5 post-merger waiver. That's H&R Block at 89.

6 So, thus, in sum, the foregoing legal standards and
7 precedents place the burden on defendants to establish that the
8 projected efficiency relied upon by Dr. Snyder are
9 substantiated, that they are reasonably verifiable by an
10 independent party, and that they are, in fact, verified.

11 Where efficiencies are not independently verifiable
12 and verified, no court in this jurisdiction has ever given any
13 weight to such efficiencies evidence. See H&R Block, 833
14 F.Supp.2d 36, D.D.C. 2011; United States versus Aetna, 240
15 F.Supp.3d, D.D.C. 2017; FTC versus Sysco Corporation, 113
16 F.Supp.3d, 1, D.D.C. 2015; FTC versus Wilhelmsen Holding, ASA,
17 341 F.Supp.3d 27, D.D.C. 2018; FTC versus Staples, 970 F.Supp
18 1066, D.D.C. 1997.

19 This is because it is the parties' interest to be
20 aggressive and optimistic in the projection of efficiencies to
21 justify their own merger. Because courts are not
22 well-positioned to verify such projections, independent
23 verification is critical in order to allow a court to determine
24 whether such projections are reliable.

25 Without verification, the efficiencies analysis could

1 swallow the analytical framework required by the Clayton Act.
2 See H&R Block at 91.

3 The Court's findings and conclusions are as follows:

4 Number one, many of the projected efficiencies in the
5 November 2020 model may be verifiable, but at least some are
6 not verifiable.

7 According to the testimony of Mr. Sansigre, he and his
8 team worked very hard to derive the efficiencies model. They
9 began in March 2020 by including detailed data about Penguin
10 Random House. When data became available from Simon & Schuster
11 in September 2020, he added that data to the model. When
12 additional data became available in October 2020, he included
13 that data as well. The data and assumptions in the model were
14 closely checked by executives in the Bertelsmann M&A group and
15 the ZI risk management group including Markus Dohle and Nihar
16 Malaviya.

17 Mr. Sansigre estimates that the model was revised a
18 hundred times before it became final. All of Mr. Sansigre's
19 judgments and assumptions were based on his broad experience in
20 M&A and in particular in M&A in the publishing industry.

21 And the Court has no doubt that Mr. Sansigre is very
22 competent, an expert in these matters.

23 Mr. Sansigre uses the term synergies and efficiencies
24 interchangeably. His model identified four categories of
25 synergies; real estate, operating expenses, variable costs, and

1 revenue.

2 The real estate efficiencies were largely based on
3 expected consolidation of Simon & Schuster's New York
4 headquarters with Penguin Random House's New York headquarters.
5 Mr. Sansigre consulted with managers within Penguin Random
6 House and determined that the personnel of Simon & Schuster
7 could be accommodated in Penguin Random House's New York office
8 space. He then examined Simon & Schuster's lease and consulted
9 with real estate experts who advised him that he could sublet
10 Simon & Schuster's office space for 50 percent of the rental
11 payments owed under the lease. He also examined other real
12 estate holdings and estimated some additional savings from
13 allowing other leases to expire. Based on those calculations,
14 he projected approximately \$10 million in savings per year,
15 almost all of which are from consolidating the New York office
16 space.

17 The operating expense synergies reflect efficiencies
18 in headcount and non-headcount expenses, essentially personnel
19 costs.

20 Mr. Sansigre's November 2020 model projected
21 \$ [REDACTED] in annual operating expense synergies in 2025.

22 You know, I didn't think of this before, parties, but
23 I do have numbers in this. Is it okay for me to be reading
24 this publicly?

25 MR. FRACKMAN: As the Court knows, we actually made

1 quite an effort to keep the numbers confidential. And I think
2 both Simon & Schuster and Penguin Random House believe they are
3 confidential. They affect personnel issues and subsequent
4 events.

5 THE COURT: I am going to black out the numbers then,
6 and we will issue a blacked out -- I will just black out the
7 numbers and then read on the record. Thank you. I'm sorry
8 about that.

9 Okay. So Mr. Sansigre's November 2020 model projected
10 a certain amount in annual operating expense synergies in 2025.
11 Mr. Sansigre began by predicting a percentage decrease in
12 operating expenses. And this figure was based on prior
13 operating expense synergies in 26 prior acquisitions including
14 the 2013 Penguin Random House merger which had operating
15 expense synergies of a certain percentage as well as
16 consultation with Penguin Random House executives like
17 Mr. Malaviya and Mr. Dohle.

18 Then Mr. Sansigre looked at the data examining costs
19 department by department to identify where operating expense
20 synergies actually might be achieved.

21 In some departments such as sales, IT, and
22 administration, Mr. Sansigre looked at specific employee roles
23 and third party contracts to determine which kinds of positions
24 or contacts might be redundant to estimate headcount and
25 non-headcount savings.

1 In some other departments such as fulfillment,
2 Mr. Sansigre used his judgment to project a percentage of
3 savings based on considerations like Penguin Random House's
4 ability to scale its distribution to meet a portion of Simon &
5 Schuster's distribution demand.

6 After reviewing the department-by-department data,
7 Mr. Sansigre compared the cumulative projected synergies of
8 that analysis with the expected percentage of synergies that he
9 had used based on prior transactions and management judgment,
10 and the two projected synergies number matched.

11 Mr. Sansigre's November 2020 model projected a
12 certain amount of annual variable cost synergies in 2025. As
13 part of the variable costs, Mr. Sansigre considered return
14 rates. He found that Penguin Random House had lower return
15 rates than Simon & Schuster by certain percentage points
16 between 2017 and 2021. He reviewed records of improved rates
17 from the 2013 merger from Penguin and Random House, the
18 acquisition of smaller publishers like Little Tiger, and
19 experiences of Penguin Random House's third party distribution
20 clients. He also consulted Simon & Schuster and Penguin Random
21 House management.

22 Based on those considerations, Mr. Sansigre used his
23 judgment to predict a certain percentage of improvement in
24 Simon & Schuster's post-merger return rate by 2025. Penguin
25 Random House's investments in a supply chain were a significant

1 factor in those projections.

2 Mr. Sansigre's November 2020 model projected a certain
3 amount of annual revenue synergies in 2025. The most
4 significant projected revenue synergies came from gross
5 physical sales and audio. After accounting for certain rising
6 costs, most significantly royalties and advance write-offs, he
7 came up with a particular number that was a projected increase
8 in sales. And the sales projections are based on
9 Mr. Sansigre's judgment and experience.

10 Penguin Random House's large sales force was a
11 significant factor in Mr. Sansigre's gross physical sales
12 projections. He believed this large sales force would get
13 Simon & Schuster books into more stores and, thus, increase
14 sales, namely in independent books stores, specialty stores,
15 and international retailers.

16 Simon & Schuster relies on its top customers for a
17 greater proportion of its sales than Penguin Random House does.
18 Mr. Sansigre interpreted this to mean that Penguin Random House
19 could improve Simon & Schuster's sales among it's non-top
20 customers.

21 Considering past acquisitions, Mr. Sansigre noted that
22 Penguin Random House doubled the sales of Little Tiger's
23 imprints within two years after acquiring the smaller
24 publisher.

25 Notably, however, Mr. Sansigre's sales projections do

1 not align with the historical data from the 2013 merger of
2 Penguin and Random House which is more similar in scale to the
3 proposed merger of Penguin Random House and Simon & Schuster.

4 After the 2013 merger, sales declined. Mr. Sansigre
5 discounts the sales results of the 2013 merger because of
6 changed market conditions including the decline of commercial
7 fiction around 2013 in which Penguin was heavily invested at
8 the time.

9 In audio Mr. Sansigre predicted that Penguin Random
10 House's significant investments in in-house audio production
11 would let it improve Simon & Schuster's audio revenue because
12 Simon & Schuster relied on third parties for much of its audio
13 revenue.

14 Mr. Sansigre used his judgment to predict that Simon &
15 Schuster would have a certain percentage increase in audio
16 revenue post merger through essentially growing with the market
17 and benefiting from Penguin Random House's in-house
18 capabilities.

19 Mr. Sansigre discounted Simon & Schuster's
20 management's relatively high predictions for a Simon & Schuster
21 standalone future audio revenue because he wanted to
22 independently analyze the value of the merger.

23 So in sum, Mr. Sansigre's projected synergies are
24 based on educated management judgments mostly based on past
25 experience and applied to whatever detailed data about the

1 businesses of Penguin Random House and Simon & Schuster that
2 was available to him.

3 Many of the projections about cost savings are
4 arguably verifiable because theoretically an independent party
5 could look at all the underlying data about the costs of each
6 entity that Mr. Sansigre compiled and inputted into his
7 spreadsheets. They could get detailed explanations about the
8 assumptions that Mr. Sansigre made in coming up with his
9 percentage estimates of savings, and they could determine
10 whether those assumptions were reasonable and based on past
11 experience. Relying on past experience is favored by the
12 horizontal merger guidelines.

13 Some of the projections, however, most notably the
14 revenue projections, are not verifiable and are not based on
15 past experience.

16 The November 2020 model projects sales synergies after
17 the merger even though past experience does not support any
18 sales synergies because after Penguin and Random House merged
19 in 2013, they experienced a decrease in sales.

20 There were other merger experiences of Penguin Random
21 House that supported the idea of sales synergies, but
22 Mr. Sansigre picked and chose among the different precedents
23 and he justified his sales projections not relying on Penguin
24 and Random House merger based on his evaluation of changed
25 marketing conditions.

1 Therefore, the actual percentages that Mr. Sansigre
2 chose to apply to revenues as synergies are not verifiable.

3 Indeed, the defendants have conceded that revenue
4 synergies are the least easy to predict, and one of
5 Mr. Sansigre's own emails in the record acknowledges that the
6 sales efficiencies are difficult to predict.

7 Ultimately, however, the projected sales synergies are
8 derived from Mr. Sansigre's personal judgment, and they are not
9 consistent with the most prominent past experience and, thus,
10 the projected sales synergies in particular are not verifiable.

11 Number two, none of the efficiencies are independently
12 verified.

13 The parties agree and stipulate that, regardless of
14 whether the model was verifiable, it was not, in fact, verified
15 by anyone outside of Penguin Random House. Thus, there was no
16 independent verification as the horizontal merger guidelines
17 and prior case law contemplate.

18 Defendants argue that the Court may verify the
19 projections by hearing how they were derived and satisfying
20 itself that Mr. Sansigre put in a lot of work and made
21 reasonable assumptions, but the Court strongly disagrees that
22 this is what is contemplated by horizontal merger guidelines
23 and the case law.

24 The Court is not in a position to fact-check what
25 Mr. Sansigre says that he did or to determine whether his

1 assumptions were reasonable. Notably, none of the cases that
2 have considered this issue support the notion that the Court
3 should provide the independent verification necessary to
4 support efficiencies evidence proffered by defendants.

5 Defendants have said that there's no case that says an
6 expert is necessary. And I think that's true. Nobody has said
7 that explicitly. But the defendants have the burden to
8 establish that these efficiencies were independently verified,
9 and they assume a risk in litigation in arguing to a court that
10 a court should do that work that in many precedents was
11 performed by experts with much more knowledge about the
12 industry and expertise in dealing with financial models and
13 assumptions than a court could reasonably be expected to have.

14 This Court notes that in the Sysco case, that court
15 found that the expert had not verified whether efficiencies
16 predicted by a consulting company were merger specific and for
17 that reason among others declined to consider the efficiencies
18 evidence. That court did not attempt to verify the merger
19 specificity on its own. And this Court is not aware of any
20 other precedent where a court has undertaken the kind of
21 rigorous verification that is necessary in order to rely on
22 efficiencies in an antitrust case.

23 Number three, subsequent updates of the November 2020
24 model undermine its reliability.

25 After the November 2020 model was created,

1 Mr. Sansigre continued to update and refine the model. Most
2 notably, new iterations of the model were created in June 2021
3 and January 2022. The new iterations have some drastically
4 different projections with respect to efficiencies. The Court
5 focuses on the January 2022 model because defendants contend
6 that the June 2021 model was about a special circumstance, a
7 possible large infusion of cash to the business.

8 Looking at the January 2022 model, that model predicts
9 an increase in gross physical sales of [REDACTED] as
10 compared to [REDACTED] in the November 2022 model.

11 The January 2022 model predicts -- I'm sorry, I should
12 not have said those numbers.

13 The January '22 model predicts a certain number in
14 fulfilling savings as compared to a much larger number
15 predicted in November 2020, and savings on administration in
16 the 2022 model is far larger as compared to the number in the
17 November 2020 model. And I understand that that includes
18 editorial and art, but the additions of those lines does not
19 account for the magnitude of the change.

20 Furthermore, certain projections of the November 2020
21 model were proved inaccurate by the actual performance of
22 Simon & Schuster in 2021.

23 While the November 2020 model made certain predictions
24 of synergies for a merged company based on inputs regarding
25 Simon & Schuster's expected performance as a standalone

1 company, the actual standalone performance of Simon & Schuster
2 exceeded the predictions.

3 This indicates that the November 2020 model is both
4 out of date because it does not include actual updated
5 performance numbers and also that the November 2020 model
6 relied on proveably wrong projections and predictions.

7 Mr. Sansigre testified that the November 2020 model is
8 still the most reliable because it reflects pre-pandemic market
9 conditions. It appears to be his judgment that the future will
10 look more like the pre-pandemic world than the present world.

11 The Court rejects that testimony because Mr. Sansigre
12 cannot possibly know what the post-pandemic world will be like
13 and whether the book industry will revert to pre-pandemic
14 levels of sales and costs. Even with the benefit of industry
15 expertise, it is clear to this Court that we are in uncharted
16 waters.

17 Thus, the Court concludes that the November 2020 model
18 is unreliable because its inputs are not updated and its
19 projections are proveably inconsistent with actual numbers for
20 Simon & Schuster in 2021. The Court finds that Mr. Sansigre's
21 justifications for continuing to use the November 2020 model
22 are unpersuasive.

23 The Court, thus, finds that the November 2020
24 efficiencies model contains some projected efficiencies that
25 are not verifiable and that, in any event, none of the

1 efficiencies have been verified as required by the horizontal
2 merger guidelines and persuasive case law.

3 Moreover, the model is unreliable because it is not
4 updated and makes proveably inaccurate projections. As a
5 result, Dr. Snyder's expert report based on the November 2020
6 model is not based on sufficient facts and data under Rule 702
7 and must be excluded.

8 Five precedents in this jurisdiction unanimously
9 support this conclusion. Those precedents are H&R Block,
10 Wilhelmsen, Staples, Aetna, and Sysco.

11 In United States versus H&R Block, the court rejected
12 efficiencies evidence where the projected efficiencies, quote,
13 were largely premised on defendant's managers' experiential
14 judgment about likely costs rather than a detailed analysis of
15 historical data.

16 The court noted that, while reliance on the estimation
17 and judgment of experienced executives about costs may be
18 perfectly sensible as a business matter, the lack of a
19 verifiable method of factual analysis resulting in the cost
20 estimates renders them not cognizable by the court.

21 If this were not so, then the efficiencies defense
22 might well swallow the whole of section 7 of the Clayton Act
23 because management would be able to present large efficiencies
24 based on its own judgment and the court would be hard pressed
25 to find otherwise.

1 In this case, many of the efficiencies projections are
2 also premised on management expectations and judgment.

3 In FTC versus Wilhelmsen Holding ASA, the court
4 rejected efficiencies evidence where the projected efficiencies
5 were based on, quote, a series of significant assumptions,
6 percentage reductions in cost, percentage increases in
7 productivity, or assumed cost product equivalencies that were
8 doing all the work in calculation of the estimates.

9 There the critical issue was that because the bases
10 for the assumptions the expert identified and their role in the
11 efficiencies analysis were unclear, the reasonableness of the
12 assumptions along with the ultimate determinations could not be
13 verified with any degree of rigor.

14 Significantly, the court in that case noted that,
15 quote, references to the merging parties' past practices,
16 managerial expertise, and incentives or internal verification
17 processes, unquote, could not, quote, serve to substantiate any
18 efficiencies, unquote, because a court cannot substitute
19 defendants' assessments and projections for independent
20 verification.

21 So here, while Penguin Random House's internal process
22 was rigorous, that internal process cannot substitute for
23 independent verification.

24 In FTC versus Staples, the court rejected efficiencies
25 evidence where, quote, the defendants' projected base case

1 savings of \$5 billion were in large part unverified or at least
2 the defendants failed to produce the necessary documentation
3 for verification, unquote.

4 Here the efficiencies also are unverified. And
5 although the defendants will say that they produced the
6 documentation for verification, as the Court has already
7 stated, the Court does not have the capability, the time, or
8 resources to perform the verification.

9 In United States versus Aetna, the court rejected
10 efficiencies evidence where the defendants' experts failed to
11 review the underlying provider contracts after the merging
12 parties approached -- after the merging parties projected
13 efficiencies based on the contracts, and that was criticized.

14 Instead, the expert noted simply that a third party
15 consultant had taken a large haircut to the total savings
16 estimated and without much analysis concluded that the savings
17 were verifiable.

18 The court deemed that insufficient. The court said,
19 without a more robust analysis which the companies have not
20 provided, the court cannot conclude that these network
21 efficiencies are verifiable and likely to be passed on to
22 consumers.

23 Here, like in that case, Dr. Snyder also failed to
24 look closely at the underlying data and did not do any robust
25 analysis to verify the efficiencies.

1 Finally, in FTC versus Sysco, the court rejected
2 efficiencies evidence where defendants' expert relied on
3 synergy projections made by McKinsey, the consulting firm which
4 was hired by Sysco to determine the prospective value of
5 acquiring U.S. Foods.

6 The court there did not question the rigor and scale
7 of the analysis conducted by McKinsey but noted that the expert
8 had not verified that the synergies were merger specific.

9 The court stated that it was not clear what
10 independent analysis the expert did to reduce McKinsey's
11 projected savings to merger-specific savings.

12 The court also noted that in one example, the expert
13 relied exclusively on documents created by either McKinsey or
14 defendants. He performed no independent analysis to verify
15 those numbers.

16 Again, similarly in this case, Dr. Snyder did not
17 perform any independent analysis to verify the numbers. And in
18 that case, the court did not undertake to do the verification
19 itself.

20 As a result, the Court will exclude Dr. Snyder's
21 testimony on efficiencies. No independent party could
22 reasonably verify the magnitude of at least some of the
23 asserted efficiencies in Mr. Sansigre's projected model,
24 especially the sales synergies, and Dr. Snyder made no attempt
25 to provide a quantitative verification of the synergies.

1 Because Dr. Snyder's testimony was not based on sufficient
2 facts and data, that testimony cannot help the trier of fact to
3 determine a fact at issue and, therefore, is not admissible
4 under Rule 702.

5 Although the Court's reasoning is firmly grounded in
6 precedents applying the horizontal merger guidelines, it bears
7 mentioning that the Court's analysis under Rule 702 is also
8 consistent with the application of that rule in other contexts.
9 It is well established that expert testimony may be excluded
10 under Rule 702 where the expert relies uncritically on
11 information provided to them by the party or parties for whom
12 they are working.

13 In the Title VII case, Campbell versus National
14 Railroad Passenger Corporation, the court excluded the
15 testimony of plaintiffs' expert who relied on a summary of
16 testimony prepared by plaintiffs' counsel to form his opinions
17 without independently reviewing or verifying that testimony.
18 That case is at 311 F.Supp.3d 281 from 299 to 300. That's
19 D.D.C. 2018.

20 The court reasoned, quote, such blind reliance on
21 facts provided by plaintiff's counsel combined with his failure
22 to review other sources of information renders his expert
23 report unreliable, unquote. That's at 300.

24 See also McReynolds versus Sodexo Marriott Services,
25 Inc., 349 F.Supp.2d 30 at 38, D.D.C. 2004, allowing in a

1 Title VII case testimony of plaintiffs' expert who relied on
2 data prepared by the opposing party instead of by the same
3 party who retained the expert.

4 And see also United States ex rel Morsell versus
5 NortonLifeLock, Inc. That's 568 F.Supp.3d 248 at 276, D.D.C.
6 2021, where expert and false claims case explicitly disclaimed
7 verification of assumptions, the expert was allowed to opine
8 only conditionally assuming the government succeeds in proving
9 the assumptions upon which the opinions rely.

10 All of these cases support the proposition that an
11 expert's opinion may be excluded as unreliable when the opinion
12 blindly rests on evidence provided by the party that retains
13 the expert. A party may not cloak unexamined assumptions in
14 the authority of expert analysis. See Ask Chemicals, LP versus
15 Computer Packages, Inc, 593 F.Appx. 506, 510, Sixth Circuit,
16 2014.

17 For all the foregoing reasons, the Court grants the
18 government's motion to exclude the defendants' efficiencies
19 evidence.

20 Does any party want any additional findings or
21 conclusions for the record?

22 MR. SCHWARZ: No, Your Honor.

23 MR. FRACKMAN: I think that covers it, Your Honor.

24 THE COURT: Okay. Thank you.

25 So we were in the midst of Dr. Snyder's testimony.

1 Shall we resume that?

2 Dr. Snyder, could you please come up to the witness
3 stand.

4 Dr. Snyder, could you stand to be sworn once again.

5 EDWARD A. SNYDER, PH.D.

6 Having been first duly sworn on oath, was examined and
7 testified as follows:

8 THE COURT: Thank you. You may be seated. And you
9 may remove your mask if you like.

10 THE WITNESS: Thank you, Your Honor.

11 MR. OPPENHEIMER: Good morning, Your Honor.

12 THE COURT: Good morning.

13 DIRECT EXAMINATION

14 BY MR. OPPENHEIMER:

15 Q Professor Snyder, good morning.

16 A Good morning.

17 Q In our last session, we were talking about the unilateral
18 effects case. And I want to go -- to continue on that same
19 vein.

20 In Dr. Hill's report, he quoted the merger guidelines,
21 horizontal merger guidelines, paragraph 6.2, that pertains to
22 this. And he observed, quoting those guidelines 6.2, in the
23 auction context, anticompetitive unilateral effects are likely
24 in proportion to the frequency or probability with which, prior
25 to the merger, one of the merging sellers had been the

1 runner-up when the other won the business.

2 Is that your understanding of what Dr. Hill's unilateral
3 effects analysis is based on? And I'm not referring to SSA
4 models. I'm referring to the general theory of harm under
5 unilateral effects.

6 A Yes. The approach, as I understand Dr. Hill's testimony
7 to reflect, is that you look at market shares and you use them
8 to predict the frequency with which the parties are one and
9 two.

10 Q And is it the case under the unilateral effects theory
11 that we have just identified that it would only makes sense for
12 the merged parties to reduce bids in the future in those
13 situations where they would have been runner-up and winner to
14 each other?

15 MR. SCHWARZ: Objection, leading.

16 THE COURT: Sustained. Could you rephrase.

17 BY MR. OPPENHEIMER:

18 Q Professor Snyder, based upon the unilateral effects
19 guidance in 6.2, can you tell us, what is the relevance of
20 determining who is the winner and the runner-up with respect to
21 determining how people would bid in the future?

22 A So with unilateral effects, the issue is will there be a
23 reduction in competition, will there be targeting by which we
24 mean reductions in offers made to authors.

25 And what the unilateral effects theory is about is tied to

1 the earlier question, the frequency with which the parties are
2 winner and runner-up. And just to be clear, this is different
3 from coordinated effects. It's different from general ideas
4 about softening of competition.

5 Q So to what degree does the theory of unilateral effects in
6 the horizontal merger guidelines rely on the notion that the
7 merging parties are winner and runner-up to each other?

8 A My understanding is that that's what they say.

9 Q Would it be fair to say that the theory of unilateral
10 effects is predicated on determining when there is head-to-head
11 competition, meaning winner and runner-up?

12 MR. SCHWARZ: Objection, leading, Your Honor.

13 THE COURT: Sustained. Let the witness testify.

14 MR. OPPENHEIMER: Yes, Your Honor.

15 BY MR. OPPENHEIMER:

16 Q Yesterday we were discussing Dr. Hill's win, loss, and
17 editorial minutes data. Do you have that in mind?

18 A I do.

19 Q Okay. Now, do either of Dr. Hill's win, loss, or
20 editorial minutes database tell you who is winner or runner-up?

21 A No.

22 Q Let me ask you this. Under the data in those data sets,
23 is it possible that Simon & Schuster lost to Penguin Random
24 House in some of those situations but that another bidder was
25 the runner-up?

1 A Yes. I mean, that's -- and it's not a criticism of the
2 data. It's just that the data cannot reveal the situation
3 where, for example, a Simon & Schuster imprint lost to a
4 Penguin Random House imprint, but there was an intervening bid
5 that was higher.

6 Q And would vice versa be true, that PRH could have lost S&S
7 but that actually other bidders were ahead of PRH?

8 A Yes.

9 Q What is the significance of that to the theory of
10 unilateral effects in this case?

11 A Well, the runner-up data and the editorial minutes data,
12 and I think I made that clear when I presented the advantages
13 of the agency data and also Dr. Hill's runner-up data, it's
14 just simply the case that those other data sets do not provide
15 information about the conditions related to unilateral effects.

16 Q Professor Snyder, you should have a notebook with your
17 reports on your desk, if you could look for that.

18 MR. OPPENHEIMER: Your Honor, this is a notebook that
19 contains Professor Snyder's reports, and I am going to be
20 looking with the professor at his rebuttal expert report of
21 June 3, 2022.

22 BY MR. OPPENHEIMER:

23 Q Professor, before you do that, one correction. You just
24 referred to the runner-up database which I was not asking
25 about. Were you referring to the win-loss database?

1 A I was trying to contrast the win-loss database and the
2 editorial minutes database versus Dr. Hill's runner-up data.

3 Q Thank you for that clarification.

4 If I could ask you to look at your rebuttal expert report
5 of June 3, 2022, I would like to draw your attention to
6 page 184 of that report and specifically to a table that's
7 depicted on that page identified as Exhibit X.8.

8 A Yes.

9 Q Professor Snyder, what are you showing in Exhibit X.8
10 on 184?

11 A I am identifying just a selection of titles from
12 Dr. Hill's win-loss records where they are not informative
13 about the issue of who is the runner-up.

14 Q Can you identify for the court whether there are any,
15 based on that exhibit, X.8, whether there are any accurate
16 depictions of winner and runner-up on that table?

17 A It might be helpful to go through the first one. Am I
18 allowed to refer to the specific title, or should I just
19 identify the first row?

20 Q Let me see if I can -- no, I prefer not. Let me see if I
21 can direct your attention.

22 If you look at the fifth title down, would you explain to
23 us what that row is describing. It starts with the title of
24 the work and the author. We won't mention those. But then if
25 you would, describe for the court, what does the rest of that

1 row identify?

2 A Yes. So what I am doing with this table just by way of
3 background is using the agency data to identify the runner-up.
4 And then I am identifying what information is provided in the
5 win-loss data that Dr. Hill includes for these various titles.

6 So the fifth one down, the source of the data is Simon &
7 Schuster. The winning publisher is an imprint at PRH. And
8 then the runner-up, according to the agency data, is Simon &
9 Schuster.

10 Q And with respect to all of the other entries, is it the
11 case that Simon & Schuster is not the runner-up?

12 A Well, in five of the other seven listed in this exhibit, a
13 party other than -- a party other than the two merging parties
14 is the runner-up. And then a seventh, I can't tell from the
15 agency data.

16 Q How does this help inform us whether the win-loss records
17 enable us to identify whether Penguin Random House and Simon &
18 Schuster are winner and runner-up?

19 A I think Dr. Hill and I agree on this. These data are
20 useful for some things, but you simply don't have the
21 information to identify who is the runner-up.

22 Q May I direct your attention to page 190 of the same report
23 a few pages down.

24 Is this a comparable analysis of the editorial meeting
25 minutes?

1 A It is.

2 Q And what is it telling us?

3 A Again, the information from the editorial minutes is
4 reflected in the third column in the sense of what is the
5 source. And then the winning publisher is identified in the
6 next column. And the first four of those, it's PRH. And the
7 fifth one is Simon & Schuster. And then the insight that is
8 provided by the agency data concerns the last column. And you
9 can see that in four out of the five presented here, some other
10 party is the runner-up.

11 Q So do these analyses inform your conclusion that
12 Dr. Hill's win-loss records and editorial meeting minutes do
13 not provide information with respect to when Penguin Random
14 House or Simon & Schuster are winner or runner-up to each
15 other?

16 MR. SCHWARZ: Objection, leading.

17 THE COURT: Sustained. I would rather hear the
18 testimony from the witness than in the form of a leading
19 question.

20 MR. OPPENHEIMER: Understood, Your Honor.

21 BY MR. OPPENHEIMER:

22 Q Can you tell us how these two charts inform your judgment
23 about their usefulness in determining when Penguin Random House
24 and Simon & Schuster are one and two in the empirical data?

25 A Well, these two data sets, of course, are drawn only from

1 the parties' discovery. So you can only identify their bidding
2 and their winning.

3 And to get information about runner-up, you have to go
4 through another process to access information about who
5 actually was runner-up. You may guess, but you are going to
6 guess right and wrong.

7 Q Based on your answer, Professor Snyder, would you describe
8 for us whether it would be appropriate to calculate diversions
9 based on the data in these two data sets?

10 A I will not calculate diversions based on data that does
11 not include information about who the runner-up actually was.
12 And you can't tell that from the win-loss data nor can you from
13 the editorial minutes.

14 Q Can the data about -- in your opinion, can the data
15 regarding diversions derived from Dr. Hill's win-loss and
16 editorial minutes databases be directly compared to your agency
17 data set?

18 A No.

19 Q Can it be used to directly compare with Dr. Hill's
20 diversion proportional to market share approach in this case?

21 A Well, proportion to market shares is based on multiplying
22 the market shares to each other. That gives you a prediction.
23 Whether or not it's accurate depends on circumstances.

24 You could have a predicted diversion that's correct, could
25 be correct, using market shares, but it could be way off. It

1 could be that two firms are bidding all the time and they are,
2 just in the duopoly context, they are winner and runner-up all
3 the time.

4 Actually, that would give you a case where you would get
5 wildly divergent predictions, but it also could be the case
6 that two firms have substantial market shares, but they are not
7 actually in head-to-head competition and actually winner and
8 runner-up.

9 So that's the basic insight with respect to market share.

10 Absent other information, using market shares to predict
11 diversion is what economists often do. In this case,
12 12 percent is the predicted diversion.

13 I think you asked something else in the question.

14 Q No, no, that's fine. I will come back to it now because I
15 want to stay focused for a minute on these two data sets.

16 Do they tell you whether Penguin Random House and Simon &
17 Schuster were competing for the same books?

18 A No. Again, I'll just reference the predictions by market
19 share. Whether those are right or wrong, you don't get
20 insights about that looking at win-loss or editorial minutes.

21 Q In those circumstances, in those records, when Penguin
22 Random House and Simon & Schuster both show up in bidding,
23 would you conclude that they were bidding for the same book?

24 A When they do show up in Dr. Hill's databases?

25 Q Yes.

1 A Yes.

2 Q Just that they were bidding for the book?

3 A Yes.

4 Q Okay. Do they tell you whether they are operating these
5 two data sets? Do they tell you whether either company is
6 operating as the competitive constraint against the other?

7 A No.

8 Q Would you explain why.

9 A Again, I think maybe I'm not explaining it well enough,
10 but you just can't identify who is the runner-up when one of
11 the parties wins unless you have a data source that identifies
12 the bids from other publishers.

13 And as Dr. Hill acknowledges, I don't think there's any
14 dispute about this, the editorial minutes and the win-loss data
15 are just looking at the two parties.

16 So you obviously cannot identify whether that information
17 corroborates an assumption about who is runner-up or not
18 because that information is simply not in those data.

19 Q You mentioned a moment ago and we heard about it yesterday
20 that the implied rate at which Penguin Random House and Simon &
21 Schuster are number one and number two in acquisitions, multi
22 bidder acquisitions in Dr. Hill's data, is 12 percent. Do you
23 have that in mind?

24 A Yes.

25 Q On your own analysis based upon the agency data, do you

1 have a different conclusion about how often Penguin Random
2 House and Simon & Schuster are one and two in multi bidder
3 situations?

4 A It's lower, but, of course, the data set is not a perfect
5 data set. It starts with almost a thousand observations. But
6 when I can identify winner and runner-up for books that have
7 advances in excess of \$250,000, the frequency of winner and
8 runner-up is lower than 12 percent.

9 Q All right. Now, I would like to come back to your earlier
10 answer where you indicated that, under the unilateral effects
11 theory in these analyses, it only makes sense for the merged
12 parties to reduce bids in the future in those situations when
13 they would have been winner and runner-up to each other. Do
14 you have that in mind?

15 A I do.

16 Q Okay. Let's go through a couple of configurations in
17 terms of the acquisition of books.

18 In terms of the unilateral harm theory of the case, in the
19 situation where Simon & Schuster lost to Penguin Random House
20 but was not the runner-up, if you could identify that those
21 situations existed when you were bidding in the future, would
22 it make sense for Simon & Schuster to reduce its bid?

23 A No.

24 Q Would you explain why.

25 A They are not winner and runner-up. The relevant

1 competitive constraint comes from somebody else.

2 Q So just so I understand, if we have five bidders for a
3 book in a multi bidder situation and Simon & Schuster is third
4 or fourth but not one or two in the bidding process, are you
5 saying that that is not a competitive constraint? And if so,
6 would you explain that.

7 A So from the point of view of the Penguin Random House
8 imprint editor and publisher point of view, you are asking the
9 question would it make sense to reduce their bid in that
10 circumstance? If they knew that Simon & Schuster was not the
11 relevant competitive constraint, then of course it would be
12 optimal not to make any change.

13 Q In that situation, would Penguin -- would it be
14 economically rational for Penguin Random House to stop bidding
15 any sooner just because hypothetically Simon & Schuster wasn't
16 in that bidding?

17 A No.

18 Q Would you explain why.

19 A Again, this is using -- this is looking at the problem
20 prospectively and asking the question when would it make sense
21 to cut advances. And what your question reveals is that
22 whether it's optimal depends on who is the relevant competitor
23 and whether that's been weakened. And if the bidder knows that
24 it's someone else, it's Hachette Workman or Hachette Little
25 Brown, competitive conditions don't change and it doesn't make

1 any sense to alter the bid.

2 Q Yesterday we had some questions regarding whether or not
3 an auction might just end earlier if Penguin Random House and
4 S&S merged.

5 Is there a reason to be concerned about harm in that
6 situation under the unilateral effects theory?

7 A No, because the auction will continue until you get to
8 that point where you have winner and runner-up. This is
9 putting aside agent adjustments.

10 Q Again, staying focused on the unilateral effects theories,
11 would it be rational to lower bids in a best bids acquisition?

12 A No.

13 Q And, again, why is that?

14 A In a best bids situation, unless you know that there's
15 been an elimination of competition by the merger where the next
16 bidder has been eliminated, it's not rational to cut the bid.
17 And then that gets into the question of what do you know in
18 that particular circumstance. The problem is you are only
19 going to be right, well, in 12 percent of the aggregate cases
20 to see that lessening of the competition.

21 Q When you say that, I infer that you will be,
22 quote/unquote, wrong in 88 percent of the circumstances. Is
23 that correct?

24 A In 88 percent of the circumstances, just focusing on this
25 decision, focusing on the unilateral effects, it would not make

1 sense to alter the bid.

2 THE COURT: Can I ask a question?

3 I am just very interested in what you are saying. It
4 seems like you are saying, because when you enter an auction,
5 you don't know who else is in it, you are not going to alter
6 your behavior because maybe the other merger party wouldn't
7 have been the second runner-up, so it shouldn't affect your
8 behavior because you don't know who else is in the auction. Is
9 that right?

10 THE WITNESS: Correct. And conversely, if you did
11 know, then you would be able to execute the targeting in
12 lowering the advance.

13 THE COURT: Okay. So what if we were talking about
14 consolidation that leads us to only two big players in the
15 market or three, like some very small number, you still think
16 it wouldn't make a difference because you still wouldn't know
17 in each auction who else is in it?

18 At some point does it matter that there's just a much
19 smaller number of possible bidders?

20 THE WITNESS: I understand your question, Your Honor.
21 With it being 12 percent, that makes it very difficult to
22 implement the strategy of lowering bids. If you were to go to
23 a completely different or a more concentrated picture, then the
24 probability of getting it right goes up and the probability of
25 getting it wrong goes down.

1 THE COURT: So there is a correlation between
2 concentration and possibility, but you are just saying we are
3 not at that level yet?

4 THE WITNESS: If you take the point of view of, say,
5 Hachette imprint -- and I think it's useful to think about
6 someone else as well, not just the merging parties -- and you
7 look at it from the point of view of one of their imprint
8 editors, I just mentioned Workman acquired last year Little
9 Brown, Grand Central, they are going into that bidding process,
10 and I think Your Honor's question goes to, well, will they want
11 to pull their punches and not bid aggressively because, say,
12 Simon & Schuster is not there anymore. And the problem that
13 they have is one of probabilities. It really goes right to
14 your intuition in terms of where would it be rational to
15 actually employ the strategy. And from their point of view,
16 who is the relevant next bidder. Is it a PRH imprint? Is it
17 HarperCollins? Is it Macmillan? Is it Norton, Astra,
18 Chronicle, et cetera? And it's just not a safe bet to go in
19 and change your bidding given the highly competitive
20 conditions, the number of parties, the frequency with which
21 non-Big 5 compete against each other, and the frequency with
22 which agents engage non-Big 5 and that they respond.

23 THE COURT: No, I understand. But you do think that
24 at some point, at a very high concentration level, the
25 probabilities would improve to lower your bids, like your

1 chances would improve of having a successful result by lowering
2 your --

3 THE WITNESS: Certainly if you got to two. And
4 depending on the -- whether they actually are in head-to-head
5 competition, but I think your question presumes that they
6 are --

7 THE COURT: So --

8 THE WITNESS: -- then the probabilities of getting it
9 right go way up.

10 THE COURT: Yes. So have you heard the testimony in
11 this trial that the market shares are actually underestimating
12 the power of Penguin Random House because the market shares
13 include Christian books for Hachette? It's like a large
14 percentage of Hachette's revenues, Christian books. But those
15 Christian books are not sold in regular retail outlets. They
16 are only sold in Christian stores. And so if you were to take
17 away Christian books, Penguin Random House would be three times
18 the size of Hachette in revenue. And if that were true, would
19 that affect your analysis?

20 THE WITNESS: First of all, I didn't -- I heard that
21 testimony. I wasn't able to verify it. I understood that
22 there was this, wow, where's the three times coming from. But
23 I can only respond in terms of actual competitive conditions.
24 And my response doesn't depend so much on the particular market
25 shares.

1 And I don't want to belabor the point, but you have
2 very robust competition within the so-called Big 5. That's not
3 going to change post merger. There will be one fewer but very
4 robust competition. And then you have the midsize publishers
5 who are bidding very frequently, winning, constraining.

6 THE COURT: You are fighting my hypothetical.

7 THE WITNESS: Pardon?

8 THE COURT: You are fighting my hypothetical, as we
9 say in law school.

10 THE WITNESS: Sorry, Your Honor.

11 THE COURT: My hypothetical is it's not things are as
12 you have analyzed it. I am saying what if we changed one of
13 the variables which is that there's much more market
14 concentration than you had assumed here. You are saying
15 there's a 12.5 percent chance of head-to-head. But if the
16 number one leader in the industry is three times the size of
17 the number two, which is not an assumption that you made in
18 your analysis, I am just wondering how that would affect your
19 analysis.

20 THE WITNESS: That goes to the whole issue of is the
21 market valid, and the 250,000 market definition is something
22 with which I have a lot of problems but -- and I assume we will
23 get to that later but --

24 THE COURT: It's a separate issue.

25 THE WITNESS: Well, all of these questions come up in

1 the context of this proposed cutoff being \$250,000. And that's
2 on that basis you are calculating shares. I understand now
3 your question. You are saying, instead of it being market
4 shares that produce the 12 percent, maybe they are higher in
5 that segment.

6 But once you get to that point, I don't want to fight
7 the hypothetical, you want to look at competitive conditions
8 that will continue post merger. And, again, everything I hear
9 is that the other big three are going to be competing
10 aggressively, imprint competition within PRH is going to
11 continue, and you have the non-Big 5.

12 THE COURT: Okay. Thank you.

13 BY MR. OPPENHEIMER:

14 Q Professor Snyder, just to clarify a few things, the
15 12 percent of the time that Penguin Random House and Simon &
16 Schuster are one and two to each other, that's not your number,
17 correct?

18 A No. That's based on Dr. Hill's advance data from which he
19 derives market shares, and it's very consistent with the market
20 share data that you would derive from my advance data with
21 the -- I haven't checked it exactly, but those are based on a
22 lot of data from both sets of advance data.

23 Q Right. And as I understand it, so your data or your
24 percentage for the times that Penguin Random House and Simon &
25 Schuster are one and two is lower, but for present purposes,

1 you are saying they are in the ball park.

2 But I also want to ask you to explain, when we see market
3 shares, whatever those market shares are, is that telling us
4 how often Penguin Random House and Simon & Schuster are number
5 one and number two, or do the 12 percent and your 7 and
6 6 percent, are they looking -- are they derived differently, or
7 are they just the market share?

8 A The market shares give you a prediction, and it can be a
9 good prediction. It can be off on the high side. It can be
10 off on the low side. I mean, two firms could get a certain
11 level of market share without ever being in head-to-head
12 competition, which means there would zero probability that they
13 would be winner and runner-up.

14 It's not a criticism of starting with that, but I just
15 want to recognize that there are limitations to relying on it.

16 Q And just for purposes of clarification, market share is
17 not the percentage of time that these parties encounter each
18 other one and two?

19 A That's right. I mean, you could -- correct. I will just
20 stop there.

21 Q Okay. Now, I want to talk about one-on-one negotiations
22 as well. You have been explaining to us why certain decisions
23 don't make economic sense for the merged party going forward
24 because of the risks they would be taking and that they would
25 be wrong 88 percent of the time if they generally applied a

1 reduction in advances.

2 What is the analysis as it applies to bilateral
3 negotiations?

4 A Well, I think Your Honor asked about this. And I only
5 answered one part of the question yesterday. But it concerns
6 this idea of might there be a perception that the competitive
7 constraint, the outside option, so to speak, has weakened in
8 the context of a one-on-one negotiation.

9 And, Mr. Oppenheimer, are you wanting me to focus just on
10 unilateral or more broadly?

11 Q If it would help you to focus more broadly, please do so.

12 A I think it was an important question and would, say, take
13 the point of view of a Hachette imprint like Workman, Little
14 Brown, and they are in a one-on-one negotiation with an author,
15 and would that affect how they negotiate. That, I think, is an
16 important question. I would just observe before going any
17 further the SSA model, of course, doesn't provide any insights.

18 I would just point out this is not confined to unilateral
19 effects. It's not about coordinated effects. It's about this
20 more general idea of would there be a softening of competition
21 based on perception.

22 Under current competitive conditions, the Little Brown
23 editor at Hachette has to think about, well, has there been a
24 production competition from the merger or is the outside option
25 unidentified going to end up being Macmillan or Norton. And

1 they don't know. And that's the problem of implementation of
2 this idea that, oh, we are going to get a cascading set of
3 effects.

4 I'm asking where is it going to happen. I think it's
5 unrealistic in that situation where you have already a
6 provisional match. You are in a one-on-one negotiation for a
7 reason, and then you are going to say, no, I'm not sure, but
8 there could be a lessening of competition out there, I am going
9 to pull punches.

10 I don't see that, because if you do that, you are going to
11 risk losing that book and getting it wrong far more than you
12 are going to get it right.

13 Q Is that what you meant by your reference to 88 percent of
14 the time you could be wrong?

15 A Well, 88 percent of the time is more narrowly focused on
16 unilateral effects involving PRH and S&S. I was trying to
17 broaden the answer to respond to Your Honor's question
18 yesterday.

19 Q By the way, when you are in a bidding situation, do you
20 know at the outset, is there any way to know whether you are in
21 the 12 percent situation or the 88 percent situation?

22 A No. And you may not get any feedback that helps you. The
23 agents are the ones who control the information flow.

24 MR. OPPENHEIMER: May we put up slide 57, Pam.
25

1 BY MR. OPPENHEIMER:

2 Q You have prepared a demonstrative for us, Professor
3 Snyder. Can you tell us what we are looking at and how this
4 relates to the 88 percent risk.

5 A These are four scenarios, each of which would contribute
6 to the 88 percent.

7 So scenario one, neither Simon & Schuster or Penguin
8 Random House wins. So with respect to the likelihood or
9 potential harm from unilateral effects, that's a no situation.
10 There's no incentive to adjust bids when there's somebody else
11 who is ahead of you.

12 And then scenario two, one of the merging parties wins and
13 the other does not even participate, from the agency data on
14 multi bid situations, that's 47 percent of the time, as I
15 recall.

16 I'm not saying that those data are representative, but
17 that's an indication that you don't always even have the
18 head-to-head competition.

19 Scenario three, PRH wins and S&S is not the competitive
20 constraint.

21 And four is the reverse.

22 Those are the situations where, if you knew you were in
23 those, you would not want to make any adjustment to how you
24 compete for acquisitions.

25 Q Do any of these four scenarios correspond in a general

1 level to bilateral negotiations?

2 A I think they do, and this goes to the question of who is
3 the relevant constraint. So PRH, S&S are in the bilateral
4 negotiation. They are the prospective winner. It's theirs to
5 lose. Who is the competitive constraint? It's a version of
6 three and four.

7 Again, going back to the Hachette, Little Brown competitor
8 situation -- they are in a one-on-one negotiation with somebody
9 conditioned on a match -- are they going to reduce their offer
10 based on the perception that competition has weakened? That's
11 the question.

12 THE COURT: Is now a good time for a break,
13 Mr. Oppenheimer?

14 MR. OPPENHEIMER: Certainly, Your Honor.

15 THE COURT: Let's take a 15-minute break at this time.
16 Thank you.

17 (A recess was taken at 11:29 a.m.)

18 THE COURTROOM DEPUTY: This court is the back in
19 session. Please be seated and come to order it.

20 THE COURT: Good morning again.

21 MR. OPPENHEIMER: Good morning, Your Honor.

22 BY MR. OPPENHEIMER:

23 Q Professor Snyder, it's good see you again.

24 Before the break there was a little bit of colloquy with
25 respect to Christian books.

1 MR. OPPENHEIMER: Your Honor, for the record, you
2 mentioned Macmillan. I think it's HarperCollins in the
3 testimony.

4 THE COURT: Yes.

5 MR. OPPENHEIMER: Okay.

6 BY MR. OPPENHEIMER:

7 Q Just a quick question for you, Professor Snyder, about
8 your data. Would you turn again or stay within, this time,
9 your rebuttal expert report, June 3.

10 A Okay.

11 Q And I would like to have you, when you have it, turn to
12 appendix C, page C1. Is that one of the appendices in your
13 report for the acquisition data you have described?

14 A Yes. And, again, at the outset I identified the fact that
15 sometimes you see these two data sets referred to as advance
16 data and sometimes as acquisition data.

17 Q And if I could draw your attention to C7 of your
18 appendix C.

19 A C7, yes.

20 Q Yes. And if I could draw your attention down to No. 30,
21 the entry No. 30 for HarperCollins, do you see that?

22 A Yes.

23 Q So do you see the reference there to general and Christian
24 divisions, all advance levels?

25 A I do.

1 Q Does that indicate that you included all of Christian when
2 you did your market share calculation?

3 A Yes.

4 Q Is it your understanding that Dr. Hill did the same thing?

5 A Yes.

6 Q So it's included in your current share calculation?

7 A Yes.

8 Q With respect, not to shares now, but to the incidents, the
9 frequency with which Penguin Random House and Simon & Schuster
10 are number one and number two, just so we have it in the
11 record, can you tell us what your percentage -- the percentage
12 you arrived at looking at the agency data?

13 A It will take me a moment to find it.

14 Q Professor Snyder, if I could direct you to page 76 of your
15 report.

16 A It's also reflected in slide 16, the earlier
17 demonstrative.

18 Q Could you read the number into the record for us.

19 A Again, could you repeat the question.

20 Q Yes. What is your percentage -- we know it's not
21 12 percent. You have said it's lower. What is your percentage
22 for the frequency of time that Penguin Random House and Simon &
23 Schuster are one and two?

24 A I recall, without redoing the calculation, about 6 or
25 7 percent.

1 Q Okay. Do you recall a difference between the 6 and
2 7 percent, what accounted for the one point difference?

3 A I think it was imprint competition.

4 Q So the lower 6 percent is taking imprint competition into
5 account; the 7 percent is not?

6 A That's my recollection.

7 Q Okay. Thank you.

8 THE COURT: If I could ask, I thought you said the
9 agency data over-included PRH and S&S. How does this number
10 become lower?

11 THE WITNESS: Oh, you're right. They do overrepresent
12 PRH and S&S. I think the figures were going from roughly
13 49 percent in the advance data to 57 percent. But within the
14 agency data, I understood the question to be when are they
15 winner and runner-up. And that's not 12 percent. It's 6 to
16 7 percent.

17 THE COURT: So 12 percent is what would be expected?

18 THE WITNESS: Correct.

19 THE COURT: Based on the larger data set?

20 THE WITNESS: That's correct.

21 THE COURT: Based on the specific agency data set,
22 their market shares are overrepresented, but it turns out they
23 are head-to-head only 6 or 7 percent of the time.

24 THE WITNESS: Head-to-head and produce --

25 THE COURT: One and two.

1 THE WITNESS: Correct.

2 THE COURT: 6 or 7 percent.

3 BY MR. OPPENHEIMER:

4 Q Professor Snyder, just so we are clear --

5 THE COURT: I'm clear.

6 MR. OPPENHEIMER: Okay.

7 BY MR. OPPENHEIMER:

8 Q Let's talk a little bit about softening competition. I
9 would like to go back to Dr. Hill's theory about that for a
10 second. What is your understanding of that theory?

11 A It's pretty much what I said before the break. It's not
12 about unilateral effects. It's not about coordinated effects.
13 It's not modeled. It's the idea that, as Your Honor said,
14 there could be some kind of cascading of effects based on
15 perception, based on knowledge that the merger has taken place,
16 and it happens -- it has to start with reductions in advances
17 by rivals.

18 Q Is there any empirical analysis that you are aware of in
19 Dr. Hill's work about softening?

20 A No.

21 Q Is there any modeling that pertains in Dr. Hill's work to
22 that softening?

23 A No. I thought I mentioned that, but definitely not.

24 MR. OPPENHEIMER: Your Honor, I know, I think, by
25 popular claim, we all decided to spend no more time on the

1 second score auction model if we could. Procedurally, we've
2 got a lot of potential slides and whatnot for the rebuttal case
3 to go back into it. There were certain areas that I did not go
4 into, specifically the inputs to that model and the description
5 of the critical threshold calibration test that Professor
6 Snyder alluded to briefly but did not go into.

7 What I would like to do now, and I just want to be
8 mindful of the Court's admonition, to go through those quickly
9 but to dispose of those two issues.

10 THE COURT: That's fine.

11 BY MR. OPPENHEIMER:

12 Q Let's start with inputs to the second score auction model.
13 Do you have any disagreements with the inputs that Dr. Hill
14 used?

15 A Yes.

16 Q What are those briefly?

17 A The two inputs into the second score auction model are
18 market shares of the two parties. You can't put in an
19 alternative diversion ratio, so that's just a requirement. You
20 use market shares. And sometimes the description of that input
21 gets a little bit confused with actual diversion ratios, but
22 he's using market shares, and that's one input.

23 And my overall view about the SSA model isn't that it
24 rises and falls on the inputs, but I do have a definite concern
25 about the other input which is margins.

1 Q Would you briefly explain that.

2 A Yes. Dr. Hill in his first report estimated the SSA model
3 with inputs for the two parties that were inconsistent. In the
4 case of PRH, he included operating expenses in the calculation
5 of the margin. And by including those, of course, that reduced
6 the margin based on that compared to the alternative. By
7 contrast, with Simon & Schuster, he excluded operating
8 expenses.

9 So he got results in his first report based on those two
10 margins being the inputs. And the model can be estimated
11 different ways. Without going into too much detail, you can
12 estimate the model with one party's margin the other party's
13 margin or an average of both.

14 I pointed out in my second report that these two inputs
15 were inconsistent. And what I did was pick margins that
16 included operating expenses for both PRH and S&S. And I
17 recalibrated his results. And I also pointed out the
18 inconsistency in Dr. Hill's first report.

19 In his final report, his third report, Dr. Hill went in a
20 different direction. He got consistency, but he got it a
21 different way, by excluding operating expenses from both firms'
22 margins.

23 So now we have consistent margins conceptually, but they
24 are not grounded in the actual book level P&Ls that the parties
25 use to make bids. So consistency not grounded in P&Ls.

1 And I mentioned this maybe quickly in passing yesterday,
2 but the test of reliability developed by Dr. Nathan Miller, who
3 developed the SSA model, it passed for the first iteration of
4 Dr. Hill's estimation in his first report, and then when he
5 responded to my criticism and he redid it, he solved the
6 consistency problem; however, the model becomes unreliable
7 based on Dr. Miller's reliability test.

8 Q Let me break those in two and we will go through it
9 quickly.

10 THE COURT: And that reliability test is you compare
11 the actual margins to what the model would predict to be the
12 margins?

13 THE WITNESS: Correct, Your Honor.

14 THE COURT: Okay.

15 BY MR. OPPENHEIMER:

16 Q What is the effect of having higher margins on the SSA's
17 assessment of harm?

18 A So in general, the greater the margins, the greater the
19 harm.

20 MR. OPPENHEIMER: Pam, could we get slide 58.

21 Your Honor, we will not be adverting to obviously any
22 of the efficiencies bars

23 BY MR. OPPENHEIMER:

24 Q Professor Snyder, I just want to draw your attention to
25 this slide, which is the estimated percent decreased and

combined entities' average author compensation 2015 to 2020.

Can you tell us, what is it that we are seeing in this?

And just direct your comments, please, to the first two bars, those being adjustments with Dr. Hill's margins, and then with corrected margins.

A Yes. Focusing on the first two, what I was referring to as Dr. Hill's results from his first report, that's depicted in the first column. And the average is -- average predicted reduction in author compensation is 6.1 percent. And that's an average of roughly an 11 percent prediction downward for Simon & Schuster and about a 4 percent predicted reduction for Penguin Random House. And that corresponds to an aggregate harm. Even though Dr. Hill did not report it in his first report, I think he doesn't disagree that that corresponds to 29.3 million in annual harm.

THE COURT: Can you just tell me, that's 6.1 percent of what? I thought this was like a billion-dollar market, so I am getting confused now about where we are getting these numbers.

THE WITNESS: The percentage reduction refers to the average percentage reduction in author compensation post merger for Penguin Random House and Simon & Schuster.

So if you predict an average of 6 percent for them --

THE COURT: So you are adding up what their author compensation was?

1 THE WITNESS: Correct.

2 THE COURT: Okay. And it's 6.1 percent of that, of
3 just the two merged parties?

4 THE WITNESS: Correct.

5 THE COURT: Okay.

6 THE WITNESS: And I admit I can't remember the
7 specific details, but I think the way Your Honor described it
8 was right. And recall that in the SSA model, there is no loss
9 in market share for the parties, so I don't think you need to
10 make an adjustment for a change in base.

11 THE COURT: Okay.

12 THE WITNESS: Should I continue?

13 BY MR. OPPENHEIMER:

14 Q Yes. Tell us what the second bar depicts.

15 A The second bar is what I presented in my second report
16 replying to Dr. Hill. And when I say with corrected margins,
17 that's my version of corrected. Now they are consistent with
18 respect to operating expenses. They are included in both. And
19 by including operating expenses, consistent with the answer I
20 gave earlier, when you input to the model lower margins, it
21 reduces harm. And here it reduces the average percent author
22 compensation from 6.1 percent down to 4.3 percent, and then the
23 aggregate annual harm falls by a corresponding amount.

24 Q Okay. And you mentioned the reliability test for the
25 second score auction model.

1 First of all, I understand the judge understands the basic
2 mechanism of that test, but would you clarify for us, what is
3 the purpose of that test? What is the consequence of failing
4 that test?

5 A Well, there's no specific cutoff that says the test is not
6 reliable based on a divergence between the predicted margin and
7 what the individual firm's margin is. Dr. Hill and I agree on
8 that. It turns out that, in his first iteration, the predicted
9 margins for each were very close.

10 Q Before you go on, maybe we can help put this in context
11 for you. We will bring up for you to talk off of slide 60.

12 MR. OPPENHEIMER: Try slide 64.

13 Thank you.

14 BY MR. OPPENHEIMER:

15 Q Would you tell us what this is. It says Hill's SSA model
16 fails reliability test, but would you describe this grid for
17 us.

18 A Sorry I'm pausing. There was a slight divergence with my
19 hard copy. But as I was referring to his first iteration,
20 that's obviously the left-hand column, the row here is S&S
21 margin prediction error. So S&S margin predicted by the model
22 was 5 percent below its actual margin and vice versa for the
23 prediction margin with respect to PRH.

24 When you go to his third report where he now has
25 consistency but higher margins because he's excluding operating

1 expenses from both PRH and S&S, the predictions versus actuals
2 diverge greatly. So the top row, the model is predicting an
3 S&S margin that is 50 percent higher than its actual margin,
4 and the lower, the second row, is predicting a 33 percent lower
5 margin for PRH compared to actual.

6 This is the -- this is telling you whether the model is
7 making sense of the inputs and the outcomes. And what this
8 failure of the reliability test means is that the results are
9 not reliable.

10 Q Thank you. Lets move on now quickly, and we can close up
11 on the GUPPI.

12 MR. OPPENHEIMER: And, Your Honor, for the same
13 reason, some of this may, I guess, come up in rebuttal.

14 BY MR. OPPENHEIMER:

15 Q Do you have an opinion as to whether Dr. Hill's GUPPI
16 analysis addresses the issues you have identified in the second
17 score auction?

18 A It does not.

19 Q Just very briefly, why is that?

20 MR. OPPENHEIMER: And may we bring up slide 15.

21 THE WITNESS: So we are going to skip over the
22 equation mercifully. It's an equation that applies to any
23 industry. It's a calculation. I said it's not an equilibrium.
24 It doesn't account for competitor responses or for author agent
25 adjustments. But in terms of the core issue of does it fit, it

1 has the same problems with SSA. It doesn't account for the
2 full extent of the mix of acquisition processes. The GUPPI
3 calculations don't cover, for example, one-one-one
4 negotiations. It doesn't account for agents' ability to select
5 among acquisitions and make adjustments. It doesn't account
6 for imprint competition. And there are no rival responses.

7 Q Did you also perform some analysis whereby you corrected
8 the inputs to the GUPPI model?

9 A I did.

10 Q Did you prepare a demonstrative to show us the results of
11 that analysis?

12 A I did.

13 MR. OPPENHEIMER: We should perhaps pause one second,
14 the famous formula. We will go to 64.

15 There we go. Okay.

16 BY MR. OPPENHEIMER:

17 Q Can you tell us what we are looking at here? And,
18 Professor Snyder, you can ignore the third column because that
19 has a calculation for efficiencies.

20 A Yes.

21 THE COURT: I'm sorry, can you just explain -- nobody
22 has explained how the GUPPI analysis actually works.

23 MR. OPPENHEIMER: Oh.

24 THE WITNESS: Then may I go to the equation?

25 THE COURT: Yes, because it's hard for me to

1 understand how it works without understanding the equation.

2 MR. OPPENHEIMER: You have made Professor Snyder's
3 day.

4 Could we go to 62.

5 Thank you.

6 There you go, Your Honor.

7 THE WITNESS: So this is the single formula that would
8 be applied to any industry; electric vehicles, pharmaceuticals,
9 video streaming.

10 MR. SCHWARZ: You said 62?

11 THE WITNESS: I think it's 60.

12 THE COURT: Can you explain like on a broad level what
13 it's trying to do?

14 THE WITNESS: Yes. So what it's trying to do is
15 answer the question, okay, I'm a firm, I am thinking about
16 exercising market power before the merger, and I've got this
17 series of competitors out there. And before the merger, you
18 take into account the loss of sales if you were to reduce in
19 this context advances or loss of acquisitions.

20 And then it's asking the question, okay, now what if
21 you merge with one party. Some of those lost sales are
22 diverted to the party you acquire. So good, good, I'm more
23 likely to exercise market power. And then how valuable is that
24 diversion. Well, I want to take into account how profitable it
25 is for the other party that gets those sales that's now part of

1 my own firm. That's basically the numerator here.

2 THE COURT: Okay.

3 THE WITNESS: And the diversion is measured here so it
4 could be here, from Simon & Schuster would be A, to Penguin
5 Random House, B, and then the margin for Penguin Random House.
6 That's the basic intuition.

7 THE COURT: Okay. So that's a percentage of the
8 premerger author comp?

9 THE WITNESS: Right.

10 THE COURT: What's pass-through?

11 THE WITNESS: Pass-through could be a variety of
12 numbers based on market conditions. Dr. Hill, when he
13 calculated the GUPPI, he used two different pass-through rates.

14 THE COURT: But what is pass-through?

15 THE WITNESS: Oh, it's the pass-through to, in this
16 context, authors, how much does this affect them.

17 THE COURT: Meaning -- can you explain that more.

18 THE WITNESS: If in the context of multi round
19 auctions you got a reduction of 4.7 percent in advances, after
20 the merger, Dr. Hill assumes that all of that would be harm to
21 authors, a hundred percent of it would mean harm.

22 THE COURT: What would be the alternative?

23 THE WITNESS: The alternative would be, I think, to
24 take into account the baked-in competitor pricing. So not all
25 of the diversion would be to just the party you acquire. Some

1 of it would be to other parties, and you would have less loss
2 to authors. And he makes a 50 percent assumption --

3 THE COURT: So you are saying if it -- if the
4 diversion would go, not just to the party you are acquiring,
5 but to other competitors?

6 THE WITNESS: It does go to -- in the GUPPI index, it
7 goes to other parties. So if the diversion in the numerator
8 from A to B is 15 percent --

9 THE COURT: Then 85 percent is going to other parties?

10 THE WITNESS: Correct, Your Honor.

11 THE COURT: I'm trying to understand the pass-through
12 though. The alternative to all the harm going to authors is
13 the harm going where?

14 THE WITNESS: Some of it gets, in effect, mitigated by
15 the fact that there are other rivals, that those other rivals
16 are not changing their prices. But the way I understand
17 Dr. Hill's view is that basically mitigates some of the harm.

18 This question might be better posed to Dr. Hill, but
19 I'm giving you my understanding of what he did.

20 THE COURT: Okay. I'm not sure I totally understand
21 that, the pass-through part of it, but I kind of understand
22 this.

23 Go ahead, Mr. Oppenheimer.

24 BY MR. OPPENHEIMER:

25 Q Is there a GUPPI -- does the GUPPI formula apply to

1 bilateral negotiations, for example?

2 A No. And Dr. Hill didn't calculate it for bilateral or
3 so-called one-on-one negotiations.

4 Q And does the GUPPI calculation typically across all of its
5 versions produce a lower harm figure than the second score
6 auction model?

7 A I think that depends on the particular formats and
8 assumptions. Both models -- excuse me. Both the SSA model and
9 the GUPPI calculations always predict some harm. That
10 direction is something that always happens.

11 THE COURT: I thought he said that he did a GUPPI
12 calculation that was hybrid which would take into account
13 bilateral negotiations.

14 THE WITNESS: My understanding was that his -- this
15 slide would show single round and hybrid on the bottom, and
16 that's where I think he dealt with the shift to best bids. I'm
17 not sure if I am answering your question, Your Honor.

18 THE COURT: I understand. I thought he said that. I
19 might be wrong.

20 THE WITNESS: If we can go back to the other slide.

21 BY MR. OPPENHEIMER:

22 Q Formula?

23 A No, for the results.

24 Q Yes. If we can switch back to the results, let me just --
25 this is the slide correcting some of the flaws in Dr. Hill's

1 GUPPI, yield small harm, that slide?

2 A I just wanted to add there's no row here for one-on-one
3 negotiations or preempts.

4 Q Can you explain what you are showing on this chart. And
5 if you would, for the record, read in the numbers as you go.

6 MR. OPPENHEIMER: This is slide 60.

7 THE WITNESS: Yes. So the first column is labeled
8 number one, but I just wanted to point out that, again, this is
9 produced in Dr. Hill's third report, but he's using the same
10 margins as input as he did in the SSA model in his first
11 report.

12 BY MR. OPPENHEIMER:

13 Q Dr. Snyder, just so we are clear, on the far left-hand
14 column, you divided this into multi round, single round hybrid?

15 A Based on what Dr. Hill did.

16 Q Thank you.

17 A He calculated it for these two groups.

18 Q Thank you.

19 A And his predicted result is 10.3 percent for the multi
20 round. And for the single round slash hybrid, it's
21 5.2 percent. And these are converted from negative numbers to,
22 going back to the formula, to positive numbers.

23 Q And what is column two?

24 A Column two is the adjustment I get when I use, instead of
25 the diversion according to share, I use the agency prediction.

1 And we talked about that being about 7 percent versus 12. And
2 when I use the margins that I used in my second report, and
3 those margins are the ones that include operating expense for
4 both parties, the results there are multi round price pressure
5 is 4.7 percent, and 2.3 percent for single round slash hybrid.

6 Q So taking the 2.3 percent for the single round hybrid, you
7 are saying, with adjusted margins, that is the harm predicted
8 by that run of the GUPPI?

9 A That's right. And you will see the same relationship in
10 Dr. Hill's column number one. And that difference reflects the
11 different pass-through rates.

12 What you see in column two with my alternative inputs are
13 numbers that are lower, but they have the same relationship,
14 two to one relationship, because of the -- I'm following
15 Dr. Hill's assumptions there about a hundred percent
16 pass-through versus 50 percent pass-through.

17 And if I may, what's important here is, again, this model
18 always produces some harm. All GUPPI calculations do. Here
19 what we are seeing is lower price pressures as a result of the
20 merger when you use these alternative inputs.

21 And there is not, Your Honor, a clear consensus on what's
22 the trigger line where you say, aha, this is a problem. As the
23 originators of the GUPPI calculations commented, this is much
24 more of a screening device. But with respect to when do you
25 actually proceed to further modeling and, for example, merger

1 simulations and so on and so forth, I believe that the
2 consensus is 5 percent.

3 So with these corrections, the GUPPI calculations are
4 saying, it's my understanding, people may disagree, would say
5 let's stop there.

6 BY MR. OPPENHEIMER:

7 Q When you say let's stop there, I just want to be clear,
8 when you refer to this as a screening device, not even do
9 further empirical or modeling work?

10 A If this is all you did, you would stop.

11 Q And can you combine in some way the different harm
12 predictions for multi round from the different harm predictions
13 for single round hybrid?

14 A Are you talking about combine the first row and the second
15 row?

16 Q Sure, yes.

17 A I don't know. I haven't tried to do it.

18 Q Has Dr. Hill provided a mechanism to do that?

19 A I don't recall.

20 Q If you were to apply this type of even screening analysis
21 to all of the acquisition transactions in the publishing world
22 at any market segment, it doesn't matter, would you have to
23 know, in order to apply it, what percentage of acquisitions
24 were multi round and what were single round hybrid?

25 A I think you would want to take that into account, but that

1 goes to a deeper issue that I think -- forgive me. I think the
2 whole modeling and calculation exercise in this context is
3 difficult because agents choose, and none of these approaches
4 account for what agents select, and then agents adjust and
5 sometimes go in one path and then go into another path. So I
6 wouldn't press that too far.

7 Q Let's talk a little bit about the market. What is your
8 understanding of the market that Dr. Hill has identified?

9 A Dr. Hill, he identifies the broad market, but he proposes
10 a market segment based on advances of \$250,000 or higher and he
11 identifies these as anticipated top sellers.

12 Q And did you reach an opinion about whether Dr. Hill's
13 proposed market for so-called anticipated top sellers is a
14 relevant antitrust market?

15 A I concluded that it is not, and there are four main
16 reasons that I have in my head about what the fundamental
17 problems are.

18 MR. OPPENHEIMER: Let's put up --

19 BY MR. OPPENHEIMER:

20 Q Let me ask you this. Do you have a view on the use of
21 price, just price, to define a market?

22 A My view on price is that price can help you corroborate a
23 proposed market, but it should not be and I don't believe it
24 has been used as the sole means of identifying a market
25 segment.

1 Q Do you see a logic for the proposed market using a cutoff
2 of \$250,000 advances?

3 A No. And if I could just go through some of the basic
4 reasons, one is when you observe the market above and below
5 that level, the basic industry functions are the same. If you
6 publish a book for an advance of a hundred thousand or a
7 million, it's the same basic steps. So the functions aren't
8 different.

9 In addition, publishers as well as agents don't operate
10 differently above and below the threshold. So before I return
11 to just the function part, my view is, if you just think about
12 those two factors, it calls into question the validity of this
13 market. The functions are the same, industry participate --
14 excuse me, industry participants don't operate differently.

15 That's in contrast to other situations where you see the
16 differences above and below a certain threshold or you see
17 differences with respect to different customers, but you don't
18 have those differences here.

19 With respect to the functions, the slide is up, I don't
20 think I need to go through them, but they are the same below
21 and above.

22 Q What is the economic significance of the fact that the
23 functions don't differ below and above the \$250,000 threshold?

24 A Well, it gives you a more robust view of what competition
25 is. One of the factors I mentioned yesterday is that there is

1 a large number of publishers who operate just below the
2 \$250,000 threshold. Those are publishers by definition that
3 are already doing all these functions, and it's just a question
4 of, instead of spending, for example, a million dollars on five
5 contracts, might they go to 400,000 on two and then the
6 remainder on another. That would put them in the market.
7 That's one difference.

8 Q There's been some discussion about marketing, and you
9 mention it in your demonstrative here. What about the point
10 that has been discussed that sometimes publishers market books
11 with higher advances with different levels of marketing, how do
12 you assess that in your analysis?

13 A Well, here I think it's important to keep in mind the
14 basic distinction between the marketing functions and the
15 marketing spend. The functions are going to be basically the
16 same. In today's world, you do the search optimization.
17 Ideally you get some social media traction. You try to get the
18 book reviewed. With respect to brick and mortar retailers, you
19 try to get the book on the shelf and ideally on the display
20 table. I forgot if I mentioned you try to get the book
21 reviewed. But you want to generate publicity about the book.

22 So the basic functions are not different. The marketing
23 spend does vary with advance level. And I agree with that
24 general proposition. Dr. Hill presented some data showing that
25 the marketing spend after the fact increases by certain buckets

1 of advance levels. So there's a positive relationship based on
2 actual spending.

3 I'm not surprised to see that, but, I mean, if you think
4 about it, if a publisher commits to a million-dollar advance
5 versus a \$200,000 advance, the publisher is going to need to
6 recoup that so they are going to spend more money at the
7 outset. And if the book gets traction in the sense that a book
8 for which they spent a lot of money ends up being a real best
9 seller, they are going to keep spending. So that's going to
10 generate that positive relationship.

11 But there's all kinds of variants around that
12 relationship. A very well-known author might be able to
13 basically sell the book herself or himself. So that
14 relationship is going to have a lot of variables or noise. But
15 in the end, I don't see anything surprising in what Dr. Hill
16 presented. I don't disagree with the numbers. It just doesn't
17 tell me that you should use a cutoff of \$250,000.

18 MR. OPPENHEIMER: Let's put up demonstrative slide 28.

19 This is a demonstrative that we exchanged with the
20 government recently.

21 BY MR. OPPENHEIMER:

22 Q Would you tell us what we are looking at here, Professor
23 Snyder.

24 A Yes. So the top of this exhibit is a reproduction of what
25 Dr. Hill presented in his third report, his reply report. It

1 draws on my advance data which, as I have indicated, goes
2 through the end of 2021. So the time period here is 2019 to
3 2021. And it reflects his proposed cutoff.

4 So on the left-hand side are market shares, and that's
5 what's shown vertically. But on the left-hand side, that's for
6 the 0 to \$250,000 range. And then the right-hand side, it
7 shows those market shares for his proposed market segment.

8 Before going back to the market shares, if I could just
9 point out that I supplemented this market share analysis that
10 he presented with information that I think helps clarify what
11 are we talking about in terms of number of contracts and total
12 advance dollars. This came up very early in the trial.

13 In the 0 to 250,000 segment, the number of contracts over
14 this three-year period is almost 26,000. In the right-hand
15 side for contracts that pass the 250,000 threshold, about
16 3,500, if you divide by 3, we get the numbers that we have
17 heard talked about in the range of 11 or 12 hundred books
18 that -- or contracts that fall into that category.

19 On the bottom I have used the advance data that Dr. Hill
20 relied on to identify the total advances. And what you see on
21 the left-hand side is 1.2 billion for the category from 0 to
22 250,000. I will mention that, because the data don't include
23 all publishers, that might be a little bit low, but it's fine.

24 And then on the right-hand side, that's where much more of
25 the dollar advance action is. It's 3.2 billion. If you add

1 those up together, it's 4.4 billion to 4.5 billion in that
2 three-year time period for both segments.

3 Q And what point was Dr. Hill making with this to justify
4 the division of the market segment at \$250,000?

5 A I think this is a, you know, maybe the core of his
6 argument or at least one of them. What he's saying is look at
7 this break. And he says look at the change in market shares,
8 they must be telling me something.

9 Now, when you go from the left-hand column to the
10 right-hand column, what you see very dramatically is that the
11 non-Big 5 publishers, their share drops from 45 percent down to
12 9 percent. And conversely, the group of Big 5 grows
13 substantially to the right.

14 Now, there's some interesting details here that I think
15 are worth noting. Hachette's share goes down. They are light
16 blue. The others are for Macmillan, not a big change. For
17 Simon & Schuster, an increase from 9 to 12. What's really
18 interesting is look at HarperCollins. It goes from 11 percent
19 to 25 percent.

20 Q Excuse me. These data are confidential.

21 A Sorry.

22 MR. OPPENHEIMER: Your Honor, perhaps it would
23 simplify things -- I don't believe that we have objection to
24 this, but if we put this demo into evidence as Plaintiff's
25 963A. 963 has already been admitted. I don't think there's

1 any dispute about any of the numbers. And then we could refer
2 to the blocks. We wouldn't have to read in any of the numbers
3 and Your Honor would have it.

4 MR. SCHWARZ: It's already in evidence. No objection.

5 MR. OPPENHEIMER: Okay, Your Honor.

6 THE COURT: Okay.

7 MR. OPPENHEIMER: If we can call this with the number
8 of contracts in total advance dollars at the bottom 963A, we
9 would move its admission at this time.

10 THE COURT: That's admitted.

11 MR. SCHWARZ: No objection.

12 (Plaintiff's 963A received in evidence.)

13 BY MR. OPPENHEIMER:

14 Q Professor Snyder, if we just discuss the conclusions
15 without reference to the specific percentages. Thank you.

16 A Is it okay to proceed by just identifying them by number 1
17 through 5 with the different colors?

18 Q Yes. Are you numbering from the top or bottom?

19 A From the top.

20 Q Sure.

21 A So light blue is No. 1. The publisher I was just
22 mentioning is No. 4 in maroon increases its share from
23 11 percent below 250,000 to 25 percent above.

24 So when I see this, it goes back to the fundamental
25 question is this threshold arbitrary. And I think Dr. Hill's

1 argument is that it's not arbitrary. We see this divergence,
2 these changes in market shares, at 250,000. That change must
3 be telling us something fundamental about the market. But when
4 I look at this, why is it 250? Why --

5 THE COURT: He did a number of different advance
6 levels, not just 250.

7 THE WITNESS: He did for things like the HMT and
8 other -- he did.

9 THE COURT: I thought his report said 250 is not a
10 magic --

11 THE WITNESS: It's not a magic number.

12 THE COURT: It works -- his analysis, he says, works
13 at 100, 250, 500, 1 million.

14 THE WITNESS: Let's take a look at the next slide, see
15 if it works for 50. I think, Your Honor, I'm not disagreeing
16 that the market shares change, and maybe that doesn't pose a
17 problem. But for me it does. Why use one threshold? Why not
18 use two? Why use 250? Why not use 50? And what's depicted on
19 the next slide is a different cut, and that's zero to 50,000
20 and then 50,000 to a million, and then a million and above.

21 And if Dr. Hill's analysis works all the time, let me
22 just look at this and see if that actually plays out, I don't
23 think so, or at least raises questions.

24 BY MR. OPPENHEIMER:

25 Q Are you comparing the drop of the non-Big 5 at 50,000 on

1 this slide No. 29 to the prior drop on Exhibit 963?

2 A That's one of the things I would look at, yes.

3 Q Just focusing on that, what is your observation about
4 that?

5 A Well, on the previous slide, and this is, I think, sort of
6 a basic agreed-upon fact, above 250,000, the non-Big 5 have 9
7 or 10 percent share.

8 When we go to this presentation, you ask the question
9 where does that drop really happen. Most of it happens at
10 50,000. The non-Big 5 go from 58 percent share below 50,000
11 down most of the way to 9 or 10 at the \$50,000 threshold. So
12 they go from 58 down to 17.

13 Q And can you describe for us the observations you make
14 about the number of contracts in total advance dollars at these
15 different cutoffs than Dr. Hill made?

16 A Yes. I find this useful to understand where the contracts
17 are, where are the dollars. And I won't read the numbers.
18 Maybe I should.

19 MR. OPPENHEIMER: Your Honor, may we go ahead without
20 objection and admit slide 29 in evidence? That way he won't
21 have to articulate the numbers.

22 THE COURT: Any objection.

23 MR. SCHWARZ: No objection, Your Honor.

24 THE COURT: That will be admitted.

25

1 BY MR. OPPENHEIMER:

2 Q You can proceed.

3 A Thank you. So in the 0 to 50,000, we have over 17,000
4 contracts. In the 50,000 to a million, we have roughly 11 and
5 a half million contracts. And then the one million and above,
6 we have 694. So over three years, that's an average of 231
7 contracts annually.

8 On the advances, recall that the total advances in the
9 previous slide was 4.4.

10 Q We don't have to articulate the numbers because Her Honor
11 will have these. If you go column, that will be fine.

12 A 45 percent of the advances are in the right-hand column,
13 the total advance dollars, associated with those 694 contracts.

14 THE COURT: Can I just ask, are markets ever defined
15 by who the main players are in the market?

16 THE WITNESS: I think who is your competitor, who are
17 you more likely to compete with, is one of the ways that you
18 can corroborate a market. I don't want to offer too much in
19 the way of obviously any kind of legal opinion on that, but I
20 think my reading is that's one of the things you look at, who
21 do you compete against and how often.

22 THE COURT: Including who your primary competitors
23 are?

24 I'm just -- in economics, is that something? Is that
25 a thing in economics?

1 THE WITNESS: It wouldn't be the first thing I would
2 go to to define a market. But I think it is useful to ask,
3 does it make sense in terms of who is competing.

4 So, for example, if you had a merger in the accounting
5 world and you said, well, we are going to look at the top
6 accounting firms in the world, and there is going to be a
7 merger for a group of customers who are -- who have different
8 characteristics, the top accounting firms would be the ones
9 most likely to compete. So I would get the logic in that
10 context.

11 THE COURT: Okay. Go ahead.

12 BY MR. OPPENHEIMER:

13 Q Do you get the logic in this context, Professor Snyder?

14 A I don't. If I may, I found this striking because if you
15 go back to the fourth of the Big 5 on this chart, and recall
16 from the previous slide that particular entity was gaining a
17 lot of share if you looked at it at the 250 cutoff.

18 Q These are the red bars?

19 A These are the red bars. Go back to Your Honor's question.
20 Now go to the next slide and say, well, at what threshold does
21 that particular publisher become a much more frequent winner.
22 It's not at 250. It's at 50.

23 So this doesn't negate the idea that you want to look at,
24 you know, what are the shares and so forth, but to me, it
25 establishes that this is just arbitrary, because if you are

1 looking for changes in the number of competitors or the shares
2 of competitors, there's nothing special about 250,000.

3 THE COURT: So I think the evidence reflects that at
4 higher advance levels, you are less likely to get the non-Big 5
5 publishers competing because they just don't have as much
6 money. And so I'm just wondering, like within economics, can
7 be you define a market by, I guess, the number of people who
8 are able to compete at a certain level?

9 THE WITNESS: And, Your Honor, you talk about
10 something -- a different threshold above 250 --

11 THE COURT: I'm not really thinking so much about
12 thresholds. I'm just thinking about -- I think the most
13 relevant, and correct me if you disagree, bar is the purple
14 one. That's the one that -- because they are the ones who may
15 be priced out at the higher advance levels.

16 And the question is, can it be a different market just
17 because, at certain levels, people are not competing or not
18 likely to compete, can that help define a market?

19 THE WITNESS: So if --

20 THE COURT: Without thinking about the numbers, I'm
21 just saying, are there some markets where, although they
22 compete on a broad market, they just don't compete on a higher
23 end scale because they can't?

24 THE WITNESS: Conceptually that may be the case. It's
25 not what I see here because --

1 THE COURT: Conceptually it's possible?

2 THE WITNESS: It's possible. But what economics tells
3 us to do and what the guidelines tell us to do is check the
4 numbers. The numbers of competitors by itself is important.
5 And then I think Your Honor's question goes to do they have the
6 capacity to compete, can they actually do it.

7 So the numbers show more than 30, increasing number of
8 publishers securing contracts above 250,000, and then you
9 recall the analysis that I did on the maximum contracts that
10 individual publishers are making over a certain time period,
11 and 15 of them are making contract deals in excess of a million
12 dollars.

13 THE COURT: So it has to take into account everyone
14 who can compete and not the ones who do?

15 THE WITNESS: Correct, because when you get to the
16 issue of the exercise of market power, you have to ask will
17 there be constraining influences even from parties that don't
18 have a big market share.

19 So I also did the analysis that showed that even
20 though the non-Big 5 only won a certain percent, they were
21 winner or runner-up 23 percent of the time. So all of my
22 analysis fits together to establish that there's a lot of
23 competition above that particular threshold.

24 The other thing I just want to say is post merger, we
25 are not going to eliminate imprint competition, in my opinion,

1 within PRH, and we are not going to eliminate competition with
2 the other three firms, Hachette, HarperCollins, and Macmillan.

3 THE COURT: Thank you.

4 BY MR. OPPENHEIMER:

5 Q If we were to use the method from Dr. Hill's chart of
6 looking to see where market share of the non-Big 5 falls off,
7 where do you see it falling off most significantly, at \$250,000
8 advance level or at the \$50,000 advance level?

9 A Non-Big 5 share drops off much more substantially at the
10 \$50,000 level just in terms of numbers.

11 Q And if we were to measure market concentrations of the
12 acquisition of books with advances of \$50,000 and up, would we
13 have a concentrated market?

14 A I can't do the HHI calculations in my head, but you would
15 have a substantially less concentrated market. Am I correct
16 your question was about 50 to a million?

17 Q Yes.

18 A Substantially less concentrated.

19 I should just mention, though, I am not proposing this as
20 an alternative market definition. And I know you asked me to
21 think about the effect on concentration. Given what I said
22 earlier about functions and operations, I don't like the idea
23 of any price cutoff.

24 Q And would you agree with me that there is no structural
25 presumption for the acquisition book market that includes all

1 advance levels?

2 A That's correct. If I can remember the basic numbers, post
3 acquisition, the HHI is roughly 1,100 or 1,200 and the change
4 is under 400. So if you apply the grid that Dr. Hill used, and
5 it reflects the merger guidelines, that's outside the range
6 where there would be any presumption of harm.

7 Q You have also raised the issue of whether books generating
8 a \$250,000 advance are anticipated to be top sellers. What is
9 your concern there?

10 A Well, this is the adjacent part of the market definition.
11 It's not just about the dollar cutoff. It's the idea that
12 there are books that you can anticipate that will be in this
13 category and the -- excuse me, the guidelines provide guidance
14 around so-called price discrimination markets. And what is
15 required is identification, meaning, okay, we all anticipate
16 such and such an author is going to be a best seller. That's
17 the identification part. And then the second part is
18 targeting.

19 The issue raised by this claim that this is a price
20 discrimination market calls into question can you reliably
21 anticipate? I would say for some, yes. Can you target? Very
22 difficult given competition.

23 Q And why is that? Why is it difficult even if you could
24 identify the target?

25 A Well, Your Honor, I would just focus on the right-hand

1 side there. It's more likely that the authors who get a
2 million dollars or more are going to fall into the category of
3 anticipated. I mean, there's probably more of a consensus.
4 I'm not saying everybody agrees, but it's more likely that the
5 answer to the question do publishers anticipate the author to
6 be a top seller, there's going to be more likelihood that
7 there's a consensus, that they are going to say yes.

8 But then on the right-hand side, that raises the question
9 of targeting, right? Okay. These are anticipated. We can
10 identify them. Are publishers actually going to be able to
11 lower advances to authors would generate about 230 books a
12 year? Who are they?

13 A lot of them are going to be very well-known authors or
14 celebrities, authors with track records, and it's exactly those
15 authors who have the most leverage. It's also those authors
16 for whom, as I testified yesterday, common factors in terms of
17 valuation are going to be relatively more important.

18 So if you are talking about an author with a very strong
19 track record, he or she's going to have -- may have a
20 relationship with one publisher, but other publishers would
21 look very fondly on the prospect of getting that author because
22 they can see the track record. Common factors are more
23 important.

24 Q By the way, does Dr. Hill ever actually identify a retail
25 sales level for books that he identifies as top sellers?

1 A I don't recall that being in the record.

2 MR. OPPENHEIMER: Lets bring up slide 31.

3 BY MR. OPPENHEIMER:

4 Q Does Dr. Hill see a one-on-one relationship between
5 anticipated top seller and the books that make the cutoff into
6 his \$250,000 market?

7 A No. This is his trial testimony, and I will just read the
8 very last part after the dash. Some books are in our market,
9 but they are probably not anticipated top sellers and vice
10 versa.

11 Q Just briefly on the hypothetical monopsonist test, did you
12 analyze it?

13 A I did.

14 Q What conclusions can you draw, if any, from Dr. Hill's
15 hypothetical monopsonist test?

16 A I think he testified that it doesn't necessarily validate
17 his demarcation point, and I would agree with him.

18 The hypothetical monopsonist test in this contest is past
19 at any dollar threshold 1,000, one million. So it's not much
20 of a test if the test is always passed. It tells us that the
21 way he set it up, self-publishing is not a relevant
22 alternative. It doesn't constrain potential exercise of
23 monopsony power here. But given that it passes at all dollar
24 thresholds, it's not informative about what threshold to
25 select.

1 Q Have you seen anything in the modeling or empirical or
2 theoretical work that Dr. Hill provided that would enable you
3 as an economist to segment the market for the acquisition of
4 books into subsets of some kind based on advance levels?

5 A Based on advance levels, the answer is no.

6 Q Is there an allegation in this case of harm to consumers
7 in the sale of books?

8 A No.

9 Q Does that have any relevance to your economic analysis?

10 A Not much. As I pointed out, consumers read what
11 publishers acquire. There's a one-to-one relationship between
12 books and the acquisition rights. But there's no allegation of
13 harm. It just focuses attention on the so-called upstream
14 market.

15 THE COURT: I think there is an allegation that lower
16 advance levels could lead to a less variety and a smaller
17 number of books. That's in the record.

18 THE WITNESS: I stand corrected. I don't recall that
19 allegation in Dr. Hill's analysis, but it may have been made by
20 somebody else.

21 BY MR. OPPENHEIMER:

22 Q Putting aside the allegation, Professor Snyder, have you
23 seen anything in Dr. Hill's work that models that issue or
24 deals with it as an empirical matter?

25 A Of that, I'm pretty sure the answer is no.

1 THE COURT: Can I go back to relevant market for a
2 minute.

3 It seems to me reasonable to think that not all books
4 are equal in the market. There's such a wide variety of them.
5 There's so many of them and so many different contracts. And
6 it does seem that this is an industry that's very focused on
7 anticipated sales. It's kind of the driving force in this
8 industry which books are going to sell because it's a business.
9 And there's been a lot of testimony about kind of a portfolio
10 of business, you are looking for the ones that are going to hit
11 big, that a large percentage of the profits are generated by a
12 small number of books.

13 So this whole industry appears to be driven by
14 anticipated sales. And so that's the factor that determines
15 what you bid for the advance level. And then later on they are
16 always assessing that's the factor that determines how much we
17 are going to market the book. If they see that it looks like
18 the sales are going to go well, later in the process after the
19 auction, they increase their marketing budgets, they try to
20 create the buzz. Everything is about sales.

21 It just seems to me reasonable that the books are not
22 all the same, and some books are going to be treated
23 differently because they are expected to sell well. And then
24 the question is just, how do you identify those books? Because
25 I guess the ones that are going to sell well do require more

1 sales, more distribution, more marketing, right? Because if
2 your book is not going to sell, you don't need all that.

3 It just seems to me intuitive that there should be
4 some kind of a segmentation based on the number of sales and
5 that the higher selling books might need different services and
6 that the authors who wrote those books might have different
7 expectations. So putting aside advance levels, doesn't that --
8 is that consistent with your view of this market?

9 THE WITNESS: Short answer is yes, Your Honor. There
10 is something about books that are anticipated to be best
11 sellers, and authors and the agents who represent them are
12 going to be looking for a set of services. One of the
13 advantages that individual firms in the Big 5 have is that they
14 have reputations because they have been in business a long time
15 and fundamentally economists talk about reputations being a
16 function of repetition. So I get that and I accept that.

17 But that doesn't -- then the issue for me would be how
18 do we draw a cutoff. Is it concentrated. And then also
19 whatever cutoff we make, or two cutoffs, do authors have -- are
20 they vulnerable to targeting, I think I have made that clear,
21 especially at the high end. I think that's a very dubious
22 proposition.

23 The other thing I would point out is that while
24 reputation and that comfort level with known Big 5s, I get, I
25 accept, there are other publishers that are really credible

1 with anticipated top sellers.

2 I mean, I am not an industry expert, but I get the
3 impression Norton is viewed as super high quality.

4 THE COURT: Yes.

5 THE WITNESS: And then you have interestingly entrants
6 who don't have any track record, but they are proceeding to
7 launch their businesses with reputable editors.

8 So, again, I am going to what's -- are there relevant
9 competitive constraints on individuals in the Big 5. And of
10 course you are going to get competition within them, but
11 there's also going to be competition from outside.

12 But I think you're right, there is this comfort level
13 that draws authors and agents to for sure consider the Big 5,
14 but it's not only them, and then there's competition within
15 them.

16 THE COURT: Thank you.

17 BY MR. OPPENHEIMER:

18 Q Have you determined any differences in the any of the
19 services you have identified, any of the functionalities that
20 would enable you to draw a line in the market at a particular
21 advance level?

22 A No. And I mentioned I distinguish between marketing spend
23 and marketing function. I agree the marketing spend is going
24 to be higher as you go to higher advance buckets, as Dr. Hill
25 depicted.

1 Q We have also heard testimony that for books that are
2 acquired at lower advance levels, that they can get -- they can
3 themselves generate buzz, they might come out at a particular
4 time when the topic that they address is hot, and that
5 marketing spend will adjust to go up for them too. How, if at
6 all, does that factor into your analysis?

7 A So in general my view is that if you think about this from
8 the point of view of the acquiring publisher, they make a
9 decision about what they are willing to spend. That puts them
10 in a situation where right out of the gate they are going to
11 want to spend more and put in more effort for books in the
12 higher advance category.

13 There are exceptions to that. Maybe, as I mentioned,
14 there are authors who make that really easy, and the effort to
15 get publicists and reviewed and shelf space really just go
16 smoothly.

17 But the distinction here is you've got the upfront
18 efforts, but then you have the ongoing efforts. And there the
19 paths diverge a little on how well the book is doing.

20 So I see the positive relationship, but again, it's about
21 spending. It's not about different functions.

22 I will just go back to the point that now all books you
23 are going to try to optimize on search mechanisms.

24 Q Let's talk a little bit about the broad market for the
25 acquisition books, just close that off.

1 What is your view on the acquisition -- on the market for
2 the acquisition of all books of this merger?

3 A It's competitive, highly competitive, and it will remain
4 so post acquisition.

5 MR. OPPENHEIMER: Let's bring up slide 22.

6 BY MR. OPPENHEIMER:

7 Q Professor Snyder, what are we looking at here in slide 22?

8 A This is market shares for the --

9 Q And let's not call them out. Just describe them. Don't
10 call the numbers out.

11 A Okay. This is market shares for the two parties. And
12 then it shows in the blue box they are combined. And this is
13 for the broad market over the time period 2019 to 2021, and it
14 uses as a data source my advance data.

15 MR. OPPENHEIMER: Your Honor, this is Defendants' 382
16 in demonstrative form. We would move its admission.

17 THE COURT: Any objection?

18 MR. SCHWARZ: No objection.

19 THE COURT: This will be admitted.

20 (Defendants' 382 received in evidence.)

21 MR. OPPENHEIMER: And it will be a confidential
22 exhibit, Your Honor.

23 THE COURT: Yes.

24 BY MR. OPPENHEIMER:

25 Q Did you examine the concentration in the market for the

1 acquisition of all the books, Professor Snyder?

2 A I did. And I have a slide depicting the HHI calculation
3 and the change in HHI calculation. I tried to do this from
4 memory a little while ago, and I think I was basically right.
5 Post acquisition the market will remain unconcentrated with the
6 HHI being less than 1,200 and the change, which is on the
7 vertical axis, is 353. That puts this far away from the area
8 where there is a structural presumption of anticompetitive
9 harm.

10 MR. OPPENHEIMER: Your Honor, this is Defendants' 426
11 in demonstrative form. I move its admission.

12 MR. SCHWARZ: No objection.

13 THE COURT: This will be admitted.

14 (Defendants' 426 received in evidence.)

15 BY MR. OPPENHEIMER:

16 Q Professor Snyder, I would like to turn to a different
17 topic now, and that the 2013 merger of Penguin and Random
18 House. Do you have that in mind?

19 A Yes.

20 Q Is that merger informative for you in analyzing the likely
21 effects of the current merger?

22 A It's informative, but that was in 2013. So if you look at
23 the history before and after, I mean, things have changed. But
24 it is informative at some level.

25 Q Are there -- first of all, what is your basic conclusion

1 with respect to the 2013 merger that would be most directly
2 applicable to our analysis today of this merger?

3 A So the number one thing and number two thing that I
4 looked at was output and advances. Output measured by titles
5 increased by 13 percent using Dr. Hill's three years before,
6 leave out 2013, three years after.

7 So if you just compare the three years before to three
8 years after, titles increased by 13 percent.

9 So as an economist, that's really fundamental to just look
10 at output. It increased.

11 Q Professor Snyder, is that in the \$250,000 and up segment?

12 A Yes.

13 Q Any other observations, general observations, from the
14 2013 merger?

15 A When I look at average advances, I think I am allowed to
16 describe this, Your Honor, without the table, what I found was
17 that if you -- instead of treating the whole range 250,000 and
18 up, if you think about it in terms of buckets, I looked at the
19 bucket from 250 to 500 thousand, average advances increased.

20 I looked at the bucket from 500,000 to a million, average
21 advances increased. And when I look at it from a million to
22 two million, average advances increased.

23 I am doing this from memory. When you go beyond that
24 level, the data are really noisy because small numbers and the
25 averages don't increase.

1 MR. OPPENHEIMER: Pam, if you could put up
2 Defendants' 385.

3 Your Honor, we would like to move for the admission of
4 Defendants' 385. There's no objection as I understand it.

5 MR. SCHWARZ: Let me see it.

6 No objection.

7 THE COURT: All right.

8 (Defendants' 385 received in evidence.)

9 BY MR. OPPENHEIMER:

10 Q What are we looking at in Defendants' 385, Professor
11 Snyder?

12 MR. SCHWARZ: Excuse me. I don't actually have a
13 copy, but I think it's in --

14 MR. OPPENHEIMER: The only notes it has are mine.

15 BY MR. OPPENHEIMER:

16 Q What are we seeing in Defendants' Exhibit 385, Professor
17 Snyder?

18 A We are looking at average advances per title over the time
19 period 2010 to 2021, and these aren't by bucket. These are by
20 different thresholds. So the bottom in light blue is for all
21 categories. And then you move to the green, that's for average
22 advances above a hundred thousand dollars. And then the next
23 one up, red is for average advances for 250,000 and above. And
24 then the top one is for average advances for 500,000 and above.

25 Q And what does this tell you?

1 A It's a different way to look at what I just described. I
2 actually prefer, as I have reflected on it, looking at these as
3 buckets rather than different thresholds.

4 I gave a summary of what I learned looking at the
5 different buckets, but what you see is that average advances
6 overall, and the key reference point is 2013, I don't see any
7 systematic reduction in average advances using this
8 methodology. In fact, I see increases or flat.

9 Q And you had alluded --

10 MR. OPPENHEIMER: Take that down, Pam. Thanks.

11 BY MR. OPPENHEIMER:

12 Q You alluded earlier to the fact that there's some high
13 variation in both the \$4 million level of the advance testimony
14 data because of small numbers. What did you mean by that?

15 A Sorry, Mr. Oppenheimer, would you --

16 THE COURT: I don't think we need to understand that.

17 Is this a good time for a lunch break?

18 MR. OPPENHEIMER: Yes.

19 THE COURT: Let's take our lunch break at this time,
20 and we will resume at 2:00. Thank you.

21 (A luncheon recess was taken at 12:56 p.m.)

22 - - -

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C E R T I F I C A T E

I hereby certify that the foregoing is an
accurate transcription of the proceedings in the
above-entitled matter.

8/17/22

s/ Tammy Nestor
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